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Prepared By:

Robert McWhirter
Certified Specialist in Criminal Law

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Editor Introduction

In keeping with our mission to foster important conversations about social justice issues, the Law Journal for Social Justice's twelfth volume encompasses diverse voices and perspectives covering a broad spectrum of issues. Each article in our twelfth volume provides a critical understanding of an issue deeply rooted in our society in the hope readers also critically engage with these issues and act toward creating solutions.

Volume twelve begins with *The Kids are Alt-Right: How the Media and the Law Enable White Supremacist Groups Recruit and Radicalize Emotionally Vulnerable Individuals*. In this article, Eleanor Boatman explores the influential factors that contribute to rising violence among white supremacist groups. Boatman discusses ways the media and the law enable these groups to recruit and radicalize individuals. Boatman uses this exploration to discuss ways to prevent this rising violence. In an age where violence and mass shootings have become frequent to our society, Boatman's critical perspective provides empowering solutions for advocates who seek to end this violence.

Next, Paul Davis critically analyzes the Voting Rights Act in *The Root of the Problem: Enforcing the Voting Rights Act in Modern Settings*. Davis argues preclearance in Section 3(c) of the Act is the best solution for addressing election discrimination, an issue relevant to our society today. Robert J. McWhirter and Jeremy L. Bogart in *"Baby Don't Be Cruel:" The Non-Retributive Eighth Amendment Versus Vengeful Victims* provide a historical analysis of punishment and the Eighth Amendment to argue retribution was not the original goal of punishment. McWhirter and Bogart find punishment focused on pure retribution is actually not aligned with the original intent of the Eight Amendment.

Last, Jose Cruz Zavala-Garcia in *The Battle Between Schools' Disciplinary Measures and Students' State Constitutional Right to an Education: A Discussion on School Discipline and a Call for Reform* discusses how zero-tolerance and harsh disciplinary measures in schools have a significantly negative impact on minority students. Zavala-Garcia argues that harsh disciplinary measures can be challenged as a deprivation of constitutional rights. Zavala-Garcia concludes by proposing ways legislatures, school boards, and schools can reform their own disciplinary procedures to prevent disproportionate effects on minority students.

Ashley Fitzgibbons
2019-2020 Editor-in-Chief

THE KIDS ARE ALT-RIGHT: HOW MEDIA AND THE LAW ENABLE WHITE SUPREMACIST GROUPS TO RECRUIT AND RADICALIZE EMOTIONALLY VULNERABLE INDIVIDUALS

By: Eleanor Boatman*

> *Few forces are more potent than fear. It can instantly cause us to lash out in rage, flee in panic or hunker down and hide. No matter which route we choose the end goal is the same: to feel safer than we did before. It's the* feeling *that matters most. This desire to feel good—to feel strong, confident, in control, etc.—can be found in everything from terrorism to the rise of the alt-right. Manipulating this desire may be the key to preventing bloodshed before it ever begins.*[1]

White supremacist groups are growing and becoming increasingly visible, especially with the rise of the alt-right.[2] The alt-right is short for the

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* Eleanor Boatman is a former Mental Health Professional and a graduate of Gonzaga University School of Law. She currently lives in New York City where she practices family defense law. She received her Master of Arts in Clinical Mental Health Counseling from Gonzaga University School of Counselor Education. She has a Bachelor of Arts in Psychology and a Bachelor of Science in Family and Human Development from Arizona State University.

She would like to thank Qasim Rashid, a human rights attorney and author, who mentored her through the writing process. She would also like to thank her former professors, Inga Laurent and Jessica Kiser, for their advice and guidance during the writing process. Lastly, she would like to thank her partner Marcos who encouraged and supported her throughout her research and writing. This accomplishment would not have been obtainable without the contribution of each of these individuals.

[1] J. Stamatelos, *Unmasking Terror: The New Psychological Approach to Understanding and Defeating Extreme Violence*, MEDIUM: MISSION.ORG (Jan. 16, 2018), https://medium.com/the-mission/the-hidden-cause-behind-terrorism-mass-shootings-the-alt-right-and-how-we-can-defeat-it-3893298b5161.

[2] *Alt-Right*, S. POVERTY LAW CTR., Profile in *Extremist Files*, https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right (last visited Sept. 14, 2019) ("The Alternative Right, commonly known as the 'alt-right,' is a set of far-right ideologies, groups and individuals whose core belief is that 'white identity' is under attack by multicultural forces using 'political correctness' and 'social justice' to undermine white people and 'their' civilization."). *See generally* Matthew N. Lyons, *Ctrl-Alt-Delete: The Origins and Ideology of the Alternative Right*, POL. RES. ASSOCIATES, (Jan. 20, 2017), http://www.politicalresearch.org/2017/01/20/ctrl-alt-delete-report-on-the-alternative-right ("The Alt Right, short for 'alternative right,' is a loosely organized far-right movement that shares a contempt for both liberal multiculturalism and

"alternative right," which is a subculture and political movement used to describe individuals and groups that share the same ideology of white nationalism, misogyny, antisemitism, and authoritarianism.[3] Groups within the alt-right, such as Identity Evropa, the Fraternal Order of Alt-Knights, League of the South, the Neo-Nazi group, Proud Boys, and many others are growing in numbers, size, and visibility.[4] Violence and domestic terrorism committed by white supremacists is also growing, making 2017 the fifth deadliest year for extremists violence since 1970.[5]

These groups are growing by targeting individuals, primarily young-adult white males, with psychosocial issues that leave them vulnerable to

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mainstream conservatism; a belief that some people are inherently superior to others; a strong internet presence and embrace of specific elements of online culture; and a self-presentation as being new, hip, and irreverent. Based primarily in the United States, Alt Right ideology combines White nationalism, misogyny, antisemitism, and authoritarianism in various forms and in political styles ranging from intellectual argument to violent invective."); ALICE MARWICK & REBECCA LEWIS, DATA & SOC'Y RESEARCH INST., MEDIA MANIPULATION AND DISINFORMATION ONLINE 4 (2017), https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf ("The term 'alt-right' is a neologism that puts a fresh coat of paint on some very long-standing racist and misogynist ideas.").
*For purposes of this paper, the term relating to "alt-right," "white supremacists," and "right-wing extremists" and related terms will be used interchangeably unless indicated otherwise.

[3] PETE SIMI, STEVEN WINDISCH & KARYN SPORER, NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, RECRUITMENT AND RADICALIZATION AMONG US FAR-RIGHT TERRORISTS 6-7 (2016), https://www.start.umd.edu/pubs/START_RecruitmentRadicalizationAmongUSFarRightTerrorists_Nov2016.pdf. *See also* Jonathan Greenblatt, *The Resurgent Threat of White-Supremacist Violence*, THE ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/politics/archive/2018/01/the-resurgent-threat-of-white-supremacist-violence/550634/ ("From the distribution of white-supremacist propaganda on campuses, to dozens of rallies and demonstrations, white-supremacist activism was visible across the country in 2017, signaling a new willingness by racist groups to put themselves front and center on the American public stage.").
[4] *See* Ryan T. Summers, *The Rise of the Alt-Right Movement*, MEDIA AND COMM. STUD. SUMMER FELLOWS, 11–12 (2017) https://digitalcommons.ursinus.edu/media_com_sum/11.
[5] *ADL Report: White Supremacist Murders More Than Doubled in 2017*, ANTI-DEFAMATION LEAGUE (Jan. 17, 2018), https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017 ("The number of white supremacist murders in the United States more than doubled in 2017 compared to the previous year, far surpassing murders committed by domestic Islamic extremists and making 2017 the fifth deadliest year on record for extremist violence since 1970."). *See* SIMI ET AL., *supra* note 3, at 5 ("[V]iolence committed by right-wing extremists represents the oldest and most persistent form of terrorism in the United States and surprisingly the deadliest form of extremism in the US since 9/11. In fact, since 9/11 right-wing extremists have killed more Americans on US soil than jihadi extremists by almost two-to-one.").

exploitation and control.[6] White supremacists are actively searching online, baiting individuals suffering from emotional and social issues, including difficulties in finding a relationship, having friends, and low self-confidence.[7] The alt-right then manipulates these individuals' weaknesses by contributing and re-enforcing their externalization of feelings (i.e. it is everyone else's fault for feeling rejected, emasculated, angry, and lonely). The alt-right tries to meet the individuals' needs in hopes to bring them into their groups.[8] The alt-right attempts to meet the individual's needs through group acceptance, re-enforcement, validation that they are superior to those they feel ostracized by, by feeding into the anxiety about having to fit into a more diverse country, or by promising those individuals that they will fight on behalf of their fears until that possibility is removed.[9] From there, the alt-right slowly introduces more extreme white supremacy beliefs once the individual has this newfound sense of purpose and group belonging.[10] Individuals are then encouraged to take action upon themselves and commit acts of domestic terrorism and smaller scale violence.[11] In 2017, white

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[6] *See* Michael F. Mascolo, *The Transformation of a White Supremacist: A Dialectical-Developmental Analysis*, 4 QUALITATIVE PSYCHOL. 223, 223 (2017) ("This is because adhering to an extreme ideology is not simply a cognitive process; it is a socioemotional processes of identification motivated by concerns related to individual and group identity.").

[7] Paris Martineau, *The Alt-Right Is Recruiting Depressed People*, THE OUTLINE (Feb. 26, 2018, 2:02 PM), https://theoutline.com/post/3537/alt-right-recruiters-have-infiltrated-the-online-depression-community?zd=2&zi=lv7l7pue ("Type "depression" or "depressed" into YouTube and it won't be long until you stumble upon a suit-clad white supremacist giving a lecture on self-empowerment. They're everywhere. For years, members of the alt-right have taken advantage of the internet's most vulnerable, turning their fear and self-loathing into vitriolic extremism, and thanks to the movement's recent galvanization, they're only growing stronger.").

[8] SIMI ET AL., *supra* note 3, at 60 ("VE [Violent Extremists] recruiters targeted three different populations: (1) frustrated and angry youth looking for solutions to their problems; (2) individuals looking for intimate relationships outside of their families and (3) younger adolescents who typically lacked maturity and may have been unable to fully comprehend the ramifications of a group's radical ideology. These individuals are especially vulnerable because they often experienced low levels of social support at home and many of them did not have positive role models to emulate."). *See also* MARWICK & LEWIS, *supra* note 2, at 1 ("Far-right groups have developed techniques of 'attention hacking' to increase the visibility of their ideas through the strategic use of social media, memes, and bots—as well as by targeting journalists, bloggers, and influencers to help spread content.").

[9] SIMI ET AL., *supra* note 3, at 52-54.

[10] *Id.* at 53 ("These experiences motivate a person to accept extremist ideologies, which often encourages the conception of violence as a form of retaliation or 'self-defense.' Participants in our sample often claimed they were protecting their race from attacks instigated by multi-culturalism and 'leftist' politics").

[11] *Id.*

supremacists were responsible for fifty-nine percent of all extremist-related fatalities.[12]

When individuals commit acts of domestic terrorism through acts of violence on behalf of white supremacy, the news often reports that the individual suffers/was diagnosed with a mental illness.[13] Society is then led to believe that the attack was due to mental illness, mainly due to false narratives from politicians and the media.[14] However, studies and data frequently show that mental illness is not the cause for the increase in violence and domestic terrorism, or even close to being the main contributing factor.[15] In fact, those with mental illness have a lower rate of gun violence than those that are not diagnosed with a mental illness, and those with mental illnesses are five times more likely to be victims of violence than they are to commit violence.[16]

There is a higher correlation of social and emotional issues that contribute to the recruitment and execution of joining far-right extremists groups[17] and committing mass violence.[18] Labeling those who commit terrorist attacks as doing so because they have a mental health diagnosis,

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[12] ANTI-DEFAMATION LEAGUE, *supra* note 5.

[13] Jesse J. Norris, *Why Dylann Roof Is A Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 284 (2017).

[14] *Id.*

[15] Sharon Jayson, *The Psychology of Hate Groups and Why People Join Them*, TAMPA BAY TIMES (Aug. 28, 2017), https://www.tampabay.com/news/health/the-psychology-of-hate-groups-and-why-people-join-them/2335084 ("Those who study human behavior attribute hate speech more to deep personality issues than to a diagnosable mental illness.").

[16] Jonathan M. Metzel & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241–42 (2015) ("[L]ess than 3% to 5% of US crimes involve people with mental illness, and the percentages of crimes that involve guns are lower than the national average for persons not diagnosed with mental illness. Databases that track gun homicides, such as the National Center for Health Statistics, similarly show that fewer than 5% of the 120,000 gun-related killings in the United States between 2001 and 2010 were perpetrated by people diagnosed with mental illness . . . 'victimization is a greater public health concern than perpetration.'") (quoting Jeanne Y. Choe, Linda A. Teplin & Karen M. Abram, *Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns*, 59 PSYCHIATRIC SERVICES 153, 153 (2008)).

[17] Nele Schils & Antoinette Verhage, *Understanding How and Why Young People Enter Radical or Violent Extremist Groups*, INT'L J. CONFLICT & VIOLENCE, 2011, at 1 ("[A] general discontent with society comes first, a search for ways of dealing with this discontent, and an orientation associated with the search."); SIMI ET AL., *supra* note 3, at 61 ("VE recruitment was purposefully targeted at youth raised in 'broken homes' as well as angry youth unable to process the seriousness of the group's ideological messages. Susceptible youth are pulled into VE because of the appeal of friendships, solutions to political grievances and the VE subculture.").

[18] SIMI ET AL., *supra* note 3, at 60.

stigmatizes an already extremely marginalized group of people, distances the acts of the violence from the perpetrator, leads Americans to misunderstand the true threat present today, and takes resources away from being able to address the real threat.[19]

The U.S. government and media have long protected this type of targeted hate speech by entrenching it into an argument on first amendment rights.[20] The Supreme Court and lower courts have consistently protected race targeted fighting words, so long as they do not "incite violence," even if the speech used creates a feeling of threat of violence for the victim.[21] With the rise of technology and the anonymity of online speech, it is nearly impossible to say who's words directly led to violence, and therefore, very little protection (if any) is offered to minorities who are the target of this speech online and the violence caused by it. Restrictions and regulations need to be put in place due to the rising violence that is directly related to racist hate speech online.[22]

Furthermore, when acts of terrorism do occur, both the government and media label the acts of violence by people of color as "terrorism," but rarely do not do so when the domestic terrorism is done by a white American male.[23] Labeling these acts as "terrorism" would help shift the social stereotypes projected by the media, lead to harsher charges for white men

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[19] Metzel & MacLeish, *supra* note 16, at 241.

[20] Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995) ("The Supreme Court held the First Amendment does not allow the imposition of 'special prohibitions on those speakers who express views on disfavored subjects.'") (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

[21] *Id.* ("The Court [in *R.A.V.*] held: 'Although the [ordinance has been limited] to reach only those symbols or displays that amount to 'fighting words' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.' . . . *R.A.V.* also held the St. Paul ordinance constituted viewpoint discrimination because it prohibited fighting words used against persons because of their racial or ethnic affiliation but did not prohibit fighting words which could be hurled in response to a race or ethnic-based attack, even if the fighting words were the same.").

[22] N. Douglas Wells, *Whose Community? Whose Rights? —Response to Professor Fiss*, 24 CAP. U. L. REV. 319 (1995) ("Hate speech should be subject to regulation because of the harm it visits upon the targets of the speech and because there is no other adequate redress for this harm. The harm caused by hate speech is greater than the psychological harm to the victims of hate speech; it also includes harm to society at large.").

[23] *See* Norris, *supra* note 13, at 271 ("Murders committed by non-Muslim extremists are less likely to be labeled as terrorist by the media. In addition, these terrorist attacks are less likely to make the national news, more commonly remaining local news stories.").

that commit acts of terrorism, and would lead to more resources being spent on stopping these acts of domestic terrorism by white supremacists, which we undoubtedly need.[24]

Violent Extremism is "inherently an overtly political act motivated by clear ideological commitments and convictions."[25] Generally, extremists use violence to address a perceived injustice and to send a political message of their perceived problems.[26] Research on the topic of terrorism and recruitment tends to focus primarily on group dynamics and behaviors while neglecting the internal and external factors of the individual that lead them to join extremists' organizations.[27] Studies also ignore that once an individual is in the group, there are continued internal and external factors that influence their behaviors and decision to stay with the extremist groups.[28]

While there is research on white supremacist groups, there is a miniscule amount of studies on the alt-right movement, and groups within.[29] As with any group, it must be noted that there are members of the alt-right that do not condone violence and they themselves have not committed acts of violence or large-scale acts of domestic terrorism.[30] There are also members of the "alt-right" that argue against labels of "white supremacists," however, there "seems to be a coherent willingness to act in support of white nationalism, even in the parts of the alt-right that do not explicitly adopt or claim it as an ideological commitment."[31]

It is important to understand many factors contribute to what causes a person to join an extremist organization and commit acts of terroristic violence when analyzing the personality and social-psychology behind the

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[24] *See* Norris, *supra* note 13, at 285–86.

[25] SIMI ET AL., *supra* note 3, at 10, 8 n.2 ("Violent extremism is defined as violence committed by an individual and/or group in support of a specific political or religious ideology and this term is often used interchangeably with terrorism. We use the term violent extremism as a broader conceptual category that includes terrorism as well as other ideologically-motivated violence that occurs but is more spontaneous than the planning required as part of most terrorism definitions.") (citation omitted.).

[26] SIMI ET AL., *supra* note 3, at 10.

[27] SIMI ET AL., *supra* note 3, at 10.

[28] SIMI ET AL., *supra* note 3, at 10.

[29] Steven M. Chermak, Joshua D. Freilich & Michael Suttmoeller, *The Organizational Dynamics of Far-Right Hate Groups in the United States: Comparing Violent to Nonviolent Organizations*, NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM 6 (2011) https://www.dhs.gov/sites/default/files/publications/944_OPSR_TEVUS_Comparing-Violent-Nonviolent-Far-Right-Hate-Groups_Dec2011-508.pdf.

[30] *Id.* at 26 ("[M]ost of the [hate] groups that do demonstrate some longevity are not linked to violent crimes and even fewer commit multiple acts of violence.")

[31] MARWICK & LEWIS, *supra* note 2, at 4.

alt-right.[32] This paper is intended to explore and discuss some of the substantial factors that contribute to the rise in violent acts and recruitment within white supremacist groups, and to identify potential ways to intervene before there are more severe consequences and even more lives are lost.

Part one of this paper analyzes the psychosocial issues that a large majority of alt-right members had prior to joining their respective groups, the type of personality that the alt-right targets, and what leads an individual to join a hate-group. Part two discusses how the alt-right manipulates social media and mass media, and their tactics for seeking out emotionally vulnerable individuals and exploiting their vulnerabilities in order to recruit them into their group. Part three goes into detail about how mental illness is not the primary cause of violent acts, or even a substantive factor, and how blaming these clear ideological actions on mental illness further stigmatizes mentally ill individuals. Part four delves into how this rise in white supremacy was able to occur, through government and media protection and lack of action, and discusses the current and future consequences of labeling the increase in domestic terrorism as a mental health issue when it is, in fact, psychosocial issues and a growth of domestic grown terrorism. Part five discusses the need for Congress to implement restrictions on social media companies to regulate the growth of white supremacist groups online.

I. THE ALT-RIGHT RECRUITS INDIVIDUALS THAT HAVE COMMON PSYCHOLOGICAL ISSUES

The majority of young adults prior to joining the alt-right, have significant psychosocial/socioemotional issues.[33] Those who have studied the psychology of white supremacist groups, including reports from previous members, report a large percentage of those join white supremacists organizations do so because they are in emotional pain.[34] This emotional pain can be from some level of childhood trauma, feelings of not belonging and discrimination, bullying, isolation, which leaves the individual with low self-esteem, feelings of injustice, lack of identity, entitlement, anger, and fear.[35] As individuals get further into the

[32] CHERMAK ET AL., *supra* note 29, at 7.

[33] Mascolo, *supra* note 6, at 227 ("Ideologies function as relatively closed systems that operate in the service of deeply felt socioemotional needs.").

[34] Stamatelos, *supra* note 1. James J. Stamatelos was a counter-terrorism analyst at the Region 13 Counter-Terrorism Fusion Center, a multi-agency body in Southwestern Pennsylvania. He also worked for the City of Pittsburgh Office of Emergency Management & Homeland Security where he supported Pittsburgh's SWAT team.

[35] Stamatelos, *supra* note 1.

radicalization process,[36] their personalities and psychosocial issues turn darker and maladaptive, leading to dehumanization and psychopathy.[37]

A. Childhood Trauma and Experiences

Studies that evaluate the environment and history of those that join the alt-right find similar themes of trauma, child maltreatment, and substance abuse. Dr. Kimmel, Director of the Center for the Study of Men and Masculinities at Stony Brook University who studies why individuals join hate groups, reported that many of the individuals "were sexually abused, beat up, bullied as children. . . . Growing up they were deeply ashamed of themselves; they didn't do well in school, they didn't have friends, they were sad, miserable, and they escaped into themselves. That just made them better targets, and the far right drew them in."[38]

Extremists tend to externalize as an attempt to regain power.[39] The mindset of these individuals on their path to joining hate groups can have an experience as follows:

1. I feel weak.
2. External situations trigger this sense of weakness and cause me to feel intense emotional pain.
3. I want these feelings of emotional pain eliminated now.
4. I pursue violence in order to replace my negative emotions with ones of dominance and control

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[36] *See generally* SIMI ET AL., *supra* note 3, at 128–29 ("[R]adicalization generally refers to the process of developing extremist ideologies and beliefs; whereas, action pathways (or action scripts) refer to the process of engaging in terrorism or violent extremist actions . . . few scholars have examined the obstacles that hinder the progression from extremist ideas to violent extremism.").

[37] *See generally* SIMI ET AL., *supra* note 3, at117.

[38] Stamatelos, *supra* note 1 (quoting J. Oliver Conroy, *'Angry White Men': The Sociologist Who Studied Trump's Base Before Trump*, GUARDIAN (Feb 27. 2017, 07.00 EST), https://www.theguardian.com/world/2017/feb/27/michael-kimmel-masculinity-far-right-angry-white-men.)

[39] Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT'L L. 33, 40 (2012) ("Predisposers are characteristics that predispose the actor toward violence, such as severe frustration, disappointment, or failure. In order for these feelings to transform into violence, the individual typically externalizes his or her blame outwardly toward others. Thus, it is common for mass murderers to view themselves as the ultimate victim."). *See* CHERMAK, *supra* note 29, at 4 n.2

> (i.e., the "fight" response of fear).40

It important to note that an individual having all the factors listed does not mean that they will engage in extremist violence.[41] It's also important to note that these factors work in connection with what the group offers the individual.[42] Meaning that feelings of isolation without the group projecting "feelings of belonging" would likely be much less influential.[43]

The National Consortium for the Study of Terrorism and Responses to Terrorism (START) conducted intensive life history interviews with forty-four former members of violent white supremacists groups and found that the individuals had higher percentages of child maltreatment than the general population.[44] Forty-five percent reported being the victim of childhood physical abuse compared to 28.3% in the general population, 23% reported being the victim of childhood sexual abuse which is slightly above the 20.7% of the US population, and 48% reported being neglected as a child with only 12.4% of the general population reporting the same.[45]

START also found that the majority of the participants reported dysfunctional family environments.[46] The participants reported having a chaotic living condition with 30% reporting parental incarceration, 32% reporting parental abandonment, and 48% reporting family substance abuse.[47] Reported substance abuse issues did not end with family use, as the study found that 64% of the participants reported experimenting with alcohol and illicit drugs prior to age 16.[48]

When it came to school issues, 58% of individuals reported truancy, and 54% of the subjects reported academic failure.[49] The substance abuse rates and rates of school issues among those prior to joining the alt-right,

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[40] Stamatelos, *supra* note 1.

[41] SIMI ET AL., *supra* note 3, at 16.

[42] SIMI ET AL., *supra* note 3 at 45. ("Without the presence of push factors, (e.g., parental abonnement) pull factors (e.g., surrogate family) would likely be much less influential.") (internal parenthesis in original).

[43] SIMI ET AL., *supra* note 3, at 48.

[44] SIMI ET AL., *supra* note 3, at 32.

[45] SIMI ET AL., *supra* note 3, at 3; *About the CDC-Kaiser ACE Study*, CTR FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/about.html (last reviewed Apr. 2, 2019) (CDC survey found that 28.3 % of American adults retrospectively reported being physically abused as a child, 20.7 % reported sexual abuse as a child, and 12.4 % reported being neglected as a child).

[46] SIMI ET AL., *supra* note 3 at 2.

[47] SIMI ET AL., *supra* note 3, at 3.

[48] SIMI ET AL., *supra* note 3, at 3.

[49] SIMI ET AL., *supra* note 3, at 3. ("i.e., expulsion from school or dropping out school").

similar to the higher rates of child maltreatment, reflect "levels of adjustment problems and high-risk behavior that far exceed typical rates of these behaviors found in the general population."[50]

These early childhood experiences influence the way that the individual begins to form their personality and shapes their internal beliefs.[51] Childhood trauma, school-related issues, and early substance abuse issues are not direct predictors for individuals that join white supremacists groups and commit acts of violence, but they are common factors in almost half of those that do.[52] However, some of the members in the alt-right have never experienced any type of childhood maltreatment and performed well in school. There are significant other common factors among those recruited by white supremacists, including family beliefs, lack of identity, low self-worth, victim mentality, emasculation, need for significance, and externalizing behaviors.[53]

B. Lack of Identity and Self-Worth

On July 20th, 2012, a twenty-four-year-old white male named James Holmes, walked into a crowded theatre in Aurora, Colorado and opened fire, massacring twelve innocent people and injuring 58 others.[54] Mr. Holmes was found guilty on 24 counts of first-degree murder, 140 attempted murder counts, and one count of possession or control of an

[50] SIMI ET AL., *supra* note 3, at 3.

[51] SIMI ET AL., *supra* note 3, at 117 ("Childhood trauma, the correspondent negative emotion and cognitive states produced by these events, and emerging adolescent conduct problems prior to violent extremism can be viewed as forms of priming events that, while not directly related to violent extremism, provide parallel experiences overlapping in content and form with violent extremism. Participation in violent extremism includes exposure to a wide range of 'reactive emotions' such as hate, anger, and frustration, all of which are consistent with subjects' earlier negative emotion states linked to childhood trauma. Violent extremism also elicits 'vitalizing emotions' that produce positive feelings such as pride and pleasure. Earlier experiences with trauma and conduct problems are cumulative and over time help transition the person from relative stability to instability, and thus the extremist group may be an attractive strategy to cope with these problems, in part, by providing positive feelings to counter-balance negative affect.") (Internal citations omitted). *See also* SIMI ET AL., *supra* note 3, at 124 ("Children who witness and experience 'violent subjugation' are likely to experience feelings of helplessness, anger, and frustration and begin to view the world as a cruel place where only the 'strongest survive.'").

[52] SIMI ET AL., *supra* note 3, at 117.

[53] Stamatelos, *supra* note 1.

[54] *Colorado Theater Shooting Fast Facts*, CNN (July 16, 2018), https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html.

explosive or incendiary device.[55] Mr. Holmes has a diagnosis of schizotypal personality disorder. However, his mental illness was not the cause of his violence and when providing defense for Mr. Holmes' actions, the defense argued that Mr. Holmes believed that by murdering innocent people in a movie theatre, he could improve his self-worth.[56] In Mr. Holmes journal, presented a trial, one excerpt states that his sense of self is "odd" because he has two separate parts of himself: his biological self that focuses on his basic needs (i.e. hunger, thirst, sleep) and the "real" version of himself, which he describes as the "thinking me." He writes in his journal that his "real" self is "frightening the biological me. The real me, namely the thinking me, does things not because I am programmed to, but because I choose to."[57] Mr. Holmes had a series of personal setbacks including failing school and breaking up with his girlfriend.[58] In his mind, taking someone else's life would make his better, and the more lives he took the more value he added to his own.[59]

The alt-right attracts individuals that feel as though there is something missing in their life: a sense of identity, a place to belong, and a feeling of purpose.[60] A sense of identity includes an individual's feelings of "self-concept, self-worth, self-esteem, and self-definition."[61] Psychologist, Dr. John Horgan, who previously led Pennsylvania State University's International Center for the Study of Terrorism, interviewed sixty former terrorists and found the following common traits:

1. Feel angry, alienated or disenfranchised.
2. Believe that their current political involvement does not give them the power to effect real change.

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[55] Verdict Form, People v. Holmes, No. 2012CR1522, 2015 WL 4555166.,

[56] Trevor Hughes, *Defense: Theater Shooter Killed to Improve Self-Worth*, USA TODAY (Apr. 28, 2015, 2:00PM), https://www.usatoday.com/story/news/nation/2015/04/27/aurora-theater-shooting/26446277/ (James Holmes' defense attorney argued that Holmes committed the shooting to improve his self-worth.).

[57] People's Ex. #341 at 13, People v. Holmes, No. 2012CR1522, 2015 WL 4555166.

[58] Ann O'Neill, Ana Cabrera &Sara Weisfeldt, *A Look Inside the 'Broken' Mind of James Holmes*, CNN (June 10, 2015, 4:04 PM), https://www.cnn.com/2015/06/05/us/james-holmes-theater-shooting-trial/index.html ("In Holmes' skewed worldview, each life he took was worth a point, adding value to his own life.").

[59] *Holmes*, *supra* note 56.

[60] SIMI, ET AL., *supra* note 3, at 46–47

[61] Michael P. Arena & Bruce A. Arrigo, *White Supremacist Behavior: Toward an Integrated Social Psychological Model*, 21 DEVIANT BEHAV., 213, 216 (2000).

3. Identify with perceived victims of the social injustice they are fighting.
4. Feel the need to take action rather than just talking about the problem.
5. Believe that engaging in violence against the state is not immoral.
6. Have friends or family sympathetic to the cause.[62]

The majority of individuals, prior to joining the alt-right, experience an identity crisis.[63] The individual does not know who they are, their purpose or meaning in life. They often feel disenfranchised, alienated from peers due to poor social skills and/or bullying.[64] These beliefs produce overwhelming levels of frustration and emotional pain which is common in individuals with a lack of confidence, security, and control.[65] The majority of the time, it is more about the validation of the individual themselves than it is about the ideology prior to becoming radicalized.[66] A search for meaning leaves individuals open to making significant changes in their lives, including potentially dying for a cause.[67]

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[62] *See* Stamelos, *supra* note 1.

[63] *See* PAUWELS, ET AL., EXPLAINING AND UNDERSTANDING THE ROLE OF EXPOSURE TO NEW SOCIAL MEDIA ON VIOLENT EXTREMISM: AN INTEGRATIVE QUANTITATIVE AND QUALITATIVE APPROACH, 26 (2014).

[64] *See id.*. *See also* Megan Holohan, *White Supremacists Recruit Teens by Making Them Feel Someone Cares*, TODAY (Aug. 21, 2017), https://www.today.com/parents/white-supremacists-prey-vulnerable-kids-exploit-weakness-t115276.

[65] *See* PAUWELS, ET AL., *supra* note 63, at 26; *see also* Holohan, *supra* note 64.

[66] *What Drives Men to Violent Extremism*, NPR (Apr. 1, 2018), https://www.npr.org/2018/04/01/598630207/what-drives-men-to-violent-extremism ("There's two entry points for young men into the movement. One is in their teen years in high school when they feel lonely, isolated. School's not working for them. They get bullied and beaten up. They have no friends. And along come these sort of skinhead guys who say, hey, hang with us. And they feel that community and connection and validation of their masculinity. So I think it's right to point this out because there are so many alienated young guys who are just sitting there, waiting for somebody to sort of come along and go, hey, hang out with us.").

[67] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RADICALIZATION AND VIOLENT EXTREMISM: LESSONS LEARNED FROM CANADA, THE U.K. AND THE U.S. 4–5 (2015)("[E]xperiencing identity conflict or confusion — whether because of a struggle to adapt to a new culture, to one's stage of life (e.g., adolescence), or to other challenges — potentially leaves individuals more open to adopting new ideas and behaviors, including those associated with violent extremism.").

II. THE ALT-RIGHT SEEK OUT INDIVIDUALS AND EXPLOIT NEGATIVE EMOTIONS TO RECRUIT AND COMMIT MASS VIOLENCE

"Before he planted his bullets in the heads of his victims, somebody planted ideas more dangerous than the bullets in his head."[68]

As discussed, the men, and the small number of women, most at risk to recruitment by the alt-right are those who feel disenfranchised, those alienated from society.[69] It is these feelings that radicalization strategically exploits.[70]

> [The alt-right is] very well aware of the grievances of potential members and offer[s] them a purposeful answer by placing these feelings within a bigger extremist picture. A positive, collective identity is created by using a frame that offers a clear us versus them logic, the ideology to explain the distinction between the two, and the grievances to prove and legitimize the distinction.[71]

To the alt-right, the results are not as important as creating the conflict itself.[72]

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[68] Hassan Guillet, *Eulogy for Québec Mosque Attack Dead: 'Alexandre Bissonnette Was a Victim, Too'*, GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/commentisfree/2017/feb/08/quebec-mosque-attack-eulogy-alexandre-bissonnette-victim-too (emphasis added) (eulogy from mother of Canadian white supremacist that committed the Quebec Mosque shooting talking about how her son was a victim of radicalization and lost his life because of the people who radicalized him to sacrifice himself for a cause he didn't even believe in).

[69] MARWICK & LEWIS, *supra* note 2 at 46.

[70] *Id.* ("The young men most at risk are those who feel disenfranchised in other areas of their life, especially those who already feel alienated from mainstream culture. It is this alienation and feeling of outsider-ness that radicalization strategically exploits."); NAT'L INST. OF JUSTICE, *supra* note 67, at 5 ("Approximately one-third of the researchers highlighted grievances as facilitating the process of radicalization to violent extremism. Specifically, they argued that feeling that one or one's group has been treated unfairly, discriminated against, or targeted by others may lead to individuals wanting to seek violent revenge or engage in violent protest against those they view as oppressing them. One researcher argued that when there is equity, citizen engagement, and equal security, there is not much room for radicalization to violent extremism.").

[71] PAUWELS ET. AL., *supra* note 63, at 28 (2014).

[72] Stamatelos, *supra* note 1 ("Terrorists are notorious for their indifference to immediate victory. Perhaps *fighting* is more important than *winning*. The sensations of

A. Exploiting Vulnerabilities

A characteristic of the alt-right psychology is a "tendency toward polarization and externalization," which leads to the justification for violence.[73] A summarization of the thought process when externalizing and polarizing is, "It's not us; it's them. They are responsible for our problems. And therefore, striking out against them is not only not prohibited, it is morally justified, it is required."[74] It is the externalizing of strong emotions that lead individuals in the alt-right organization to commit acts of violence.[75] Former white supremacists "attributed the initial appeal of [violent extremism to] the support and comradery experienced among members in the movement" and the "attractiveness of the family and community atmosphere."[76]

As discussed in §1(E), there are two theories among researchers about the level of importance beliefs play prior to joining the alt-right.[77] One theory, and the most widely accepted, is that once an individual gets pulled into the welcoming arms of the alt-right, they are slowly pushed towards more extremists beliefs and actions.[78] The other theory is that these individuals had these underlying beliefs, and the relationship with the alt-right simply made them more comfortable with expressing and strengthening their beliefs.[79]

Both theories come into play when discussing the exploitation of negative emotions.

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fighting against an evil adversary may provide payoffs they don't get otherwise. Victory isn't their pursuit, conflict is.").

[73] Jerrold M. Post, *Terrorism and Right-Wing Extremism: The Changing Face of Terrorism and Political Violence in the 21st Century: The Virtual Community of Hatred*, 65 INT'L J. GROUP PSYCHOTHERAPY 242, 245 (2015).

[74] *Id.*

[75] Mascolo, *supra* note 6, at 225 ("[T]he grievances (appraisals) that organize extreme ideologies generate strong emotion. In White supremacy, these include experiences of *fear* (e.g., of social displacement or perceived Black aggression) and *anger* (e.g., in response to perceptions of disenfranchisement or decline in social position;, *hate* (e.g., in reaction to perceived powerlessness), , and *disgust* (e.g., over perceived racial impurity of lack of moral virtue). Such emotions are important because they amplify the importance of ideological grievances and imbue them with passion while simultaneously generating action tendencies toward targets of ideological grievance. Among White supremacists, these action tendencies range from the desire to separate from and marginalize Blacks, to the spreading of hateful messages, to, at their most extreme, acts of violence and terror.") (citations omitted).

[76] SIMI, ET AL., *supra* note 3, at 47.

[77] SIMI, ET AL., *supra* note 3, at 47.

[78] *See* SIMI, ET AL., *supra* note 3, at 46–47.

[79] *See* SIMI, ET AL., *supra* note 3, at 46–47.

i. Feelings of Significance, Injustice, and Victimization

"In a sense what is going on here is not only the white supremacist 'movement' per se, but a broader sentiment of the victimized white male to which white supremacists adhere and add, but which they also utilize and exploit."[80]

To cope with the feelings of having no identity and purpose, the individuals externalize these negative emotions.[81] The alt-right then channels into these negative coping skills by supporting the underlying cognitive beliefs of being a victim and reinforcing the externalization of feelings as a way to manage their pain.[82] The majority of the alt-right have issues with masculinity and gender roles,[83] which will be addressed in more detail in the next section, but they also feel like victims of perceived injustices as well.[84]

An individual seeking after personal significance, real or perceived, is "based on the view that an individuals' personal significance is being threatened."[85] Social rejection, exclusion, personal loss, and humiliation are all threats to an individual's significance.[86]

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[80] Mitch Berbrier, *The Victim Ideology of White Supremacists and White Separatists in the United States*, 33 SOC. FOCUS 175, 187 (2000).

[81] *Id.*

[82] *See* Shuki J. Cohen et al., *Invisible Empire of Hate: Gender Differences in the Ku Klux Klan's Online Justifications for Violence*, 5 VIOLENCE AND GENDER 209, 209 (2018) ("[T]he . . . porousness and emphasis on inclusion and homogeneity may have facilitated the spontaneous 'mutation' of the traditional KKK ideology into a generic Far-Right ideology that enjoys broad consensus. Rhetorically, this generic right-wing ideology downplays overt racial and violent elements and eschews theological controversies by relating to Christianity instrumentally as a cultural heritage rather than a religion in the metaphysical sense of the word.").

[83] ANTI-DEFAMATION LEAGUE, WHEN WOMEN ARE THE ENEMY: THE INTERSECTION OF MISOGYNY AND WHITE SUPREMACY 5 (2018). https://www.adl.org/media/11707/download ("There is a robust symbiosis between misogyny and white supremacy; the two ideologies are powerfully intertwined. While not all misogynists are racists, and not every white supremacist is a misogynist, a deep-seated loathing of women acts as a connective tissue between many white supremacists, especially those in the alt right, and their lesser-known brothers in hate like incels (involuntary celibates), MRAs (Men's Rights Activists) and PUAs (Pick Up Artists).").

[84] Stamatelos, *supra* note 1.

[85] SIMI ET AL., *supra* note 3, at 52.

[86] SIMI ET AL., *supra* note 3, at 52-53.

> The white separatist concern with shame and lost self-esteem plays on the contemporary value of individual identity . . . . Whites are presented here as innocent victims of diverse, sometimes amorphous victimizers. The injuries perpetrated by the "system" include the "destruction" of pride and identity; being "crushed"; having the "spirit broken down"; and the high rates of suicide that result from "alienation."[87]

Individuals then try to protect themselves from the threat of insignificance and often associate with other groups that appear to share perceived injustices.[88] "Perceived injustice" is the view that an individual's own group is treated unfairly by society and is unjustly disadvantaged compared to other groups.[89] It is the experience and feeling of perceived injustice that is more important than the objective discrimination and deprivation.[90] Therefore, an individual, who feels insignificant after years of their own personal history with rejection, trauma, and/or isolation, end up aligning with the group of men who also feel unjustly treated.[91] White extremists groups are aware of this and use it to their advantage to radicalize these vulnerable individuals. The victim ideology in the white supremacist rhetoric is a recruitment tactic because it "give[s] meaning and purpose to feelings of anger on the part of embittered and frustrated people. . . . It is an identity strategy: the goal is explicitly to develop the consciousness of Whites as Whites, understanding Whites as a class of victimized persons."[92] The alt-right is actively seeking to align with these beliefs, naming it an attack on their identity, polarizing and dramatically increasing these negative emotions, furthering the disconnect from opposing views. The alt-right also exploits and aligns with vulnerabilities related to other non-politically correct sentiments, or unpopular views, such as misogyny.

ii. Emasculated/Anti-Feminism

"The fact is, when you give women rights, they destroy absolutely everything around them, no matter what other variable is involved . . .

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[87] Berbrier, *supra* note 80, at 184.
[88] SIMI ET AL., *supra* note 3, at 53.
[89] PAUWELS ET AL., *supra* note 63, at 24.
[90] PAUWELS ET AL., *supra* note 63, at 24.
[91] PAUWELS ET AL., *supra* note 63, at 24-25.
[92] Berbrier, *supra* note 80.

even if you become the ultimate alpha male, some stupid bitch will still ruin your life." –Andrew Anglin, DailyStormer.com[93]

The majority of individuals in the alt-right that commit acts of violent extremism are committed by young males in their late teens and early twenties.[94] Although it is not rare to find a significant disproportionality between violent crimes and gender, there is a growing theme among the alt-right and other white supremacists organizations promoting masculinity, degrading women, and some subgroups even calling for extreme violence against women.[95] While not all alt-right members are misogynistic, and not all misogynists are white supremacists, there is a large majority that has misogynistic views.[96] These views are also shared among the small number of women in the alt-right.[97] The views range anywhere from promoting mid-century nuclear family values to outright disdain for all women and calls for violence against them, including rape and murder.[98] There are also

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[93] ANTI-DEFAMATION LEAGUE, supra note 83, at 5 (citing Andrew Anglin, *Brad Pitt Losing Weight and His Mind After Whore Wife Ruins His Life*, DAILY STORMER (Mar. 31, 2017), https://dailystormer.name/brad-pitt-losing-weight-and-his-mind-after-whore-wife-ruins-his-life/).

[94] J. Reid Meloy & Jessica Yakeley, *The Violent True Believer as a "Lone Wolf" - Psychoanalytic Perspectives on Terrorism*, 32 BEHAV. SCI. & LAW, 347, 351 (2014) (Dr. Meloy, a clinical professor of psychiatry at the University of California, San Diego, School of Medicine, stated that the violent extremists, particularly the "lone wolf" extremists, are young men "probably due to the relative immaturity of the prefrontal cortex and consequent impulsivity, psychological grandiosity, identification vulnerability, and biologically based androgenic drivers that peak during this growth period.").

[95] ANTI-DEFAMATION LEAGUE, *supra* note 93, at 5–6 (In large part due to the alt-right's "lesser-known brothers in hate like incels (involuntary celibates), MRAs (Men's Rights Activists) and PUAs (Pick Up Artists)," which are some of the groups that tend to have the most extreme views towards women, the anger towards women has polluted the narrative and identity of many across the alt-right. "Men who hate women – masking fear, sexual insecurity or ignorant devotion to ideological misogyny – are vocal within the alt right, which enjoys a synergetic bond with the more specifically misogynistic extremist movements like incels and MRAs. Alek Minassian, who killed 10 people, eight of whom were women, in the April 2018 Toronto van attack, and neo-Nazi Andrew Anglin are among the most visible examples of this hatred – but they are far from unique."); Summers, *supra* note 4, at 14 ("Daniel Friberg, co-founder of *altright.com* . . . echoes these values in his handbook *The Real Right Returns* (2015). He agrees that the myth of equality of both sexes harms men and women—especially focusing on men who feel they are forced to compete with women in the job market.").

[96] ANTI-DEFAMATION LEAGUE, *supra* note 83.

[97] Summers, *supra* note 4, at 13 ("When women are accepted as members of the movement, they must emphasize the need to rebuild heteronormative white families with traditional values and gender roles.").

[98] ANTI-DEFAMATION LEAGUE, *supra* note 83; Lise Gotell & Emily Dutton, *Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape*, 5 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 65, 65 (2016) ("MRAs appear to be using the

young men who express sincere anxiety and concern about the shift in culture, from going from white males having privilege in a diverse country to having to accept the growth of minorities in the U.S. and more equal opportunities for minority groups. These men believe this change and growth in diversity and equality will lead to the mistreatment of men through fear-based perceived future discrimination, and mean no ill will towards women, but become embedded in the culture where their views toward women become more extreme.[99]

Young men are joining extremist movements because a majority of them feel a personal sense of emasculation due, in large part, to factors listed earlier (i.e., isolation, bullying, low self-worth, etc.).[100] The theme of victimization comes back into play, as many of these individuals that join the alt-right feel as though they are victims of a changing culture they do not understand, in part or fully due to women,[101] or because of trauma experienced at the hands of other men.[102] Many young men have expressed anxieties about shifting consent standards and gender norms, and it is in spaces like the "manosphere" that these individuals end up when trying to grapple with these fears and insecurities.[103] The "manosphere"[104] is a term

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issue of rape to mobilize young men and to exploit their anxieties about shifting consent standards and changing gender norms.").

[99] Summers, *supra* note 4, at 7–8.

[100] *See* Berbrier, *supra* note 80.

[101] *See* Berbrier, *supra* note 80. (The individuals "may find themselves confronted by ideologies regarding diversity and multiculturalism which identify them as part of a dominant hegemonic majority of which they subjectively feel no part. They feel blamed and confused.").

[102] Gotell & Dutton, *supra* note 98, at 73 ("Straughan's widely viewed v-log 'Don't Be that Lying Feminist' (2013) (86,298 hits) is posted on both MRE and AVFM. Straughan contends that feminist 'ideologues' victimize men by 'associating the behaviour of a small group with the group as a whole.'"); Jacques C. Legault, *Jordan Peterson, Masculinity and the Alt-Right*, MEDIUM (Feb. 26, 2018), https://medium.com/@jacquesrlegault/jordan-petersons-paradox-and-the-alt-right-861e3482842b (A psychologist, Dr. Jacques Legault, when discussing how the alt-right personality forms towards masculinity issues, stated that the dynamic displayed by the alt-right "reveals unresolved childhood emotionally and or physically painful experiences at the hands of men and other boys. And the more educated these men are, the greater the intellectual and intellectualizing edifices or armour they have constructed to protect themselves from their forgotten history. Ultimately, they have been robbed of their ability to trust other men with their vulnerabilities, and have cut themselves off from their core dependency needs, which as a species has been central to our survival. And these men tend have a rather individualistic, me against the world stance towards life and others.").

[103] Gotell & Dutton, *supra* note 98, at 71.

[104] MARWICK & LEWIS, *supra* note 2, at 14 ("Mark Potok of the Southern Poverty Law Center characterizes the manosphere as 'an underworld of so-called Men's Rights groups and individuals on the Internet, which is just fraught with really hard-line antiwomen misogyny.' The manosphere often adopts liberal tropes of oppression to portray men as the

used to refer to spaces across the web, such as blogs, forums, and websites, devoted to discussing masculinity, hatred of feminism, and feelings of being victimized by women.[105] Once in the manosphere, such as the subreddit, r/MensRights, an individual seeking guidance about the changing culture, his anxieties related to it, and how to deal with his issues in a healthy way is met by views that push the individual further into their negative feelings of discrimination and polarization of the opposing view.[106] In a study done using a thematic content analysis of the Isla Vista mass shooter's manifesto, sociologist, Christopher Vito, found that when the shooter "does not receive societal confirmation of his masculinity, he experiences a crisis of masculinity and feelings of aggrieved entitlement wherein he directs his anger at racial minorities and women.[107] He eventually adopts a violent masculinity and executes a violent retribution when his experiences do not live up to culturally defined gender expectations."[108]

Some individuals in the alt-right held misogynistic views prior to joining the group and sought out the manosphere for the purpose of finding those with similar views of women. Despite being sexist, they still do not share the same ideology as the white supremacists when they enter the manosphere. It is not until they are in the group and aligned in their sexist beliefs that the alt-right groups begin to introduce them slowly to their ideologies, enmeshing them into their hatred towards women. A current member of the alt-right and participant on the white supremacist forum, The Right Stuff (TRS), stated that he was brought over to the alt-right, because "[he] always hated feminism and female empowerment, despite liking many elements of the left. When [he] got older and realized the left was only open to feminists or allies [he] stopped claiming it."[109] Underlying misogyny, or fears and anxieties related to gender shifts, are other factors that brings an individual to the alt-right.[110]

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victims of feminism gone too far. The *American Prospect* wrote that 'MRAs claim to be a movement for positive change, with the stated aim of getting men recognized as an oppressed class—and women, especially but not exclusively feminists, as men's oppressors.'").

[105] MARWICK & LEWIS, *supra* note 2, at 13–14. ("These groups share a strong dislike for feminists, who they see as emasculating, and 'political correctness,' which they view as censorship.").

[106] ANTI-DEFAMATION LEAGUE, *supra* note 83, at 12.

[107] Christopher Vito et al., *Masculinity, Aggrieved Entitlement, and Violence: Considering the Isla Vista Mass Shooting*, 13 NORMA 86, 87 (2017).

[108] *Id.*

[109] HATEWATCH STAFF, *McInnes, Molyneux, and 4chan: Investigating Pathways to the Alt-Right*, SOUTHERN POVERTY LAW CENTER (Apr. 19, 2018), https://www.splcenter.org/20180419/mcinnes-molyneux-and-4chan-investigating-pathways-alt-right.

[110] *Id.*

Valid societal critique can be found in some of the threads and forums within the manosphere. There are men who have been sexually assaulted that feel marginalized and left out of the sexual assault awareness and prevention movement happening.[111] The rise of the recent women's empowerment movement, #MeToo, is seen as an attack on men in general and a rejection of their feelings and experiences. Some researchers argue that this is a result of privilege or underlying sexist attitudes.[112] However, it is important to listen to reasonable critiques, because doing so could prevent more men from being radicalized by the alt-right and simultaneously bring attention to an important social issue that needs to be addressed.[113] The movement for women's rights has become entangled in the advocacy of sexual assault, which has caused some male victims of sexual assault to feel ignored and unsupported.[114] Our society is not doing an adequate job of bringing attention to male trauma and emotions.[115]

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[111] Associated Press, *Male Victims of Sex Abuse Feel Left Behind by #MeToo Parade*, NEW YORK POST (Apr. 19, 2018), https://nypost.com/2018/04/19/male-victims-of-sex-abuse-feel-left-behind-by-metoo-parade/ ("For some male victims of sexual assault and abuse, #MeToo can feel more like #WhatAboutMe? They admire the women speaking out about traumatic experiences as assault and harassment victims, while wondering whether men with similar scars will ever receive a comparable level of public empathy and understanding.").

[112] Berbrier, *supra* note 80, at 188 ("If indeed the white supremacist movement's victim strategy is inseparable from a more generalized cultural drift among mainstream and conservative Whites, then this may explain its perceived utility as a recruiting and mobilizing strategy. Whatever its merits or absurdities, the notion that Whites are victims of oppression at the hands of a nonwhite left-wing cabal can be very attractive to young Whites — perhaps especially to young white males who also see themselves as victimized by 'radical feminism,' who do not possess the elementary historical or sociological knowledge to recognize the implications of an historically privileged position, and who (at least among the middle- and upper-class Whites) have been specifically trained not to see how their advantaged upbringing might relate to their success in life.").

[113] Legault, *supra* note 102 (A psychologist with over 20,000 hours of clinical experience working with men, Dr. Jacques Legault, found that, "[p]sychologically, these men are terrified of revealing their vulnerabilities and core dependency needs to other men for fear of being shamed by the brotherhood. Men have rarely reported to me experiences of being shamed at the hands of female teachers in primary school . . . as compared to these experiences at the hands of other hurt boys (bullies), brothers, fathers, and men, reinforcing their resolve to harden their armour. This ultimately cuts them off from their ability to be fully human and embrace life with resilience, creativity, and a compassionate will to power and meaning.").

[114] Associated Press, *supra* note 111 ("'Because the movement happened to get its start with women only, in a way it furthers my loneliness as a past victim,' said Chris Brown, a University of Minnesota music professor. He was among several men who in December accused renowned conductor James Levine of abusing them as teens several decades ago, leading to Levine's recent firing by the Metropolitan Opera Company.").

[115] Associated Press, *supra* note 111

Sexual assault on men happens often and is significantly underreported.[116] It is important that we, as a society, bring attention to all victims of sexual assault. There should be a separation of the advocacy of speaking up against sexual assault if there is pushback or concerns with doing a better job including male victims of sexual assault in the #MeToo movement. Addressing this exclusion of attention brought to male sexual assault and emotional abuse as a society and validating the reasonable voices hidden within the manosphere would, not only address an area that needs to be given more attention, but also could potentially hinder the ease of recruitment for white supremacist groups, as there would be one less area of trauma for them to exploit.[117] Working to address the vulnerabilities and negative emotions men experience can potentially prevent part of the resentment these individuals feel, and that the alt-right exploits.

B. Recruitment Tactics

"Give a man a mask and he'll tell you the truth."[118]

There are many ways, including marketing strategies, in which the alt-right recruits their members.[119] A significant way that the alt-right is able to grow in members and maintain visibility is its online activity and media manipulation.[120] For example, the alt-right manipulates the social media

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[116] Associated Press, *supra* note 111 ("The psychologists and therapists who work with MaleSurvivor endorse the findings of multiple studies concluding that about one in six men in the US experienced childhood sexual abuse, compared with one in four women. Many adult men also suffer sexual abuse: Rape in prison is frequent, and the latest Pentagon survey found that 6,300 men in the military said they were victims of sexual assault or other unwanted sexual contact in 2016. Despite such data, experts say many men, because of social stigma and feelings of shame, are reluctant to speak up about the abuse they experienced or to seek professional help.").

[117] Associated Press, *supra* note 111 ("Joan Cook, the Yale professor, said she was thrilled by the magnitude of the #MeToo movement, yet frustrated on behalf of abused men who 'don't seem to be included under the tent. Women have waited so long to get their due, so maybe there's an attitude of, 'Don't take away my voice,'' Cook said. 'But it's not a competition. Men also have been waiting a long time, and they shouldn't have to wait. They should be heard now.'").

[118] Oscar Wilde, *The Critic as Artist*, *in* INTENTIONS 95, 185(14th ed. 1921) (c. 1891) (a majority of the alt-right activity happens behind anonymous accounts where individuals feel freer to spread hate and messages of violence).

[119] SIMI ET AL., *supra* note 3, at 1 ("In terms of recruitment, extremist groups relied on a variety of marketing strategies (e.g., leafleting and house parties) in order to promote their political agenda. Our data suggest these groups targeted marginalized youth who were angry and looking for solutions to their problems.").

[120] PAUWELS, ET AL., *supra* note 63, at 7 ("Scholars and policy makers increasingly focus on unraveling the processes of radicalization, hoping to prevent the violent

platform, "YouTube," by using a network of fake accounts to change YouTube's algorithm in its favor and show more of its videos to a wider population of users using the site.[121]

The online world provides avenues for individuals who have trouble finding and communicating with like-minded individuals to find support.[122] Unfortunately, it can also lead those individuals to deviant communities.[123] Since there are significantly fewer consequences for most online behavior, it intensifies the individual's "willingness to express in words his anger, hatred, contempt, and disgust for out-groups, fostering the use of more primitive psychological defenses: others are to blame (projection); others are threatening him (projective identification); others are all bad (splitting)."[124] There is a known internet presence of the alt-right that leads to the threatening and harassment of others, calls for violence, and other deeply disturbing forms of actions.[125] Radicalizers sweep through the internet "seeking lonely, alienated individuals to whom they give a sense of belonging and significance."[126] Leaders in the alt-right movement, like James Allsup, state that it was through the internet that he was radicalized.[127]

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radicalization of their own youth and in the end political violence . . . . In particular, the internet and its constant technological developments are cause of concern.").

[121] Kelly Weill, *Leaked: The Alt-Right Playbook for Taking Over YouTube,* DAILY BEAST, (Mar. 1, 2018), https://www.thedailybeast.com/leaked-the-alt-right-playbook-for-taking-over-youtube.

[122] NAT'L INST. OF JUSTICE, *supra* note 67, at 7.

[123] NAT'L INST. OF JUSTICE, *supra* note 67, at 7.

[124] John Horgan & Max Taylor, *Making of a Terrorist*, 13 JANE'S INTELLIGENCE REV.16, 16 ("What we know of actual terrorists suggests that there is rarely a conscious decision made to become a terrorist. Most involvement in terrorism results from gradual exposure and socialization towards extreme behavior.").

[125] Joel Stein, *How Trolls Are Ruining the Internet*, TIME, August 29, 2016 at 26 ("What [the alt-right] do for the lulz ranges from clever pranks to harassment to violent threats. There's also doxxing—publishing personal data, such as Social Security numbers and bank accounts—and swatting, calling in an emergency to a victim's house so the SWAT team busts in. . . . In 2012, after feminist Anita Sarkeesian started a Kickstarter campaign to fund a series of YouTube videos chronicling misogyny in video games, she received bomb threats at speaking engagements, doxxing threats, rape threats and an unwanted starring role in a video game called Beat Up Anita Sarkeesian. In June of this year, Jonathan Weisman, the deputy Washington editor of the New York Times, quit Twitter, on which he had nearly 35,000 followers, after a barrage of anti-Semitic messages. At the end of July, feminist writer Jessica Valenti said she was leaving social media after receiving a rape threat against her daughter, who is 5 years old.").

[126] Post, *supra* note 73, at 264.

[127] *James Orien Allsup*, Profile in *Extremist Files*, S. POVERTY LAW CTR., https://www.splcenter.org/fighting-hate/extremist-files/individual/james-orien-allsup ("Videos from Jared Taylor were massively influential. Molyneux stuff about race and IQ has been very eye opening as well.")(quoting James Allsup) (last visited Sept. 18, 2019).

As discussed earlier, a depressed and/or isolated individual will go online to places such as YouTube, Reddit, 4Chan, etc., seeking comradery or help, and without even being aware of it, they will be pulled in by the white supremacists.[128] The culture of racism, sexism, and hate online is so powerful that it has become normalized to see when browsing through social media sites.

i. Facebook

Facebook has become a recruiting ground for alt-right groups, including the "Proud Boys," a group self-described as being "western chauvinists" and one the FBI labels as an extremist group.[129] The Proud Boys have "vetting" pages on Facebook, in which the "administrators review applicants for approval into a private chatroom where local chapters are organized."[130] Violence and the dissemination of their acts of violence is common with the Proud Boys.[131] On October 12, 2018, a group of Proud Boys beat three men in the streets of New York, with some repeatedly kicking one man who was down on the ground and curled up on the sidewalk.[132] A member of the Proud Boys posted a video of the assault the next day where you can hear racial and homophobic slurs being proudly

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[128] *See* MARWICK & LEWIS, *supra* note 2, at 28.

[129] *Proud Boys,* Profile in *Extremist Files*, S. POVERTY LAW CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys ("Established in the midst of the 2016 presidential election by *VICE* Media co-founder Gavin McInnes, the Proud Boys are self-described 'western chauvinists' who adamantly deny any connection to the racist 'alt-right,' insisting they are simply a fraternal group spreading an 'anti-political correctness' and 'anti-white guilt' agenda. Their disavowals of bigotry are belied by their actions: rank-and-file Proud Boys and leaders regularly spout white nationalist memes and maintain affiliations with known extremists. They are known for anti-Muslim and misogynistic rhetoric. Proud Boys have appeared alongside other hate groups at extremist gatherings like the "Unite the Right" rally in Charlottesville. Indeed, former Proud Boys member Jason Kessler helped to organize the event, which brought together Klansmen, antisemites, Southern racists, and militias."); Hatewatch Staff, *Facebook's Fight Club: How the Proud Boys Use the Social Media Platform to Vet Their Fighters*, S. POVERTY LAW CTR.: HATEWATCH, https://www.splcenter.org/hatewatch/2018/08/02/facebooks-fight-club-how-proud-boys-use-social-media-platform-vet-their-fighters (Aug. 2, 2018); Jason Wilson, *FBI Now Classifies Far-Right Proud Boys as 'Extremist Group', Documents Say*, THE GUARDIAN, https://www.theguardian.com/world/2018/nov/19/proud-boys-fbi-classification-extremist-group-white-nationalism-report (Nov. 19, 2018).

[130] Hatewatch Staff, *supra* note 129.

[131] Brandy Zadrozny & Ben Collins, *Far-Right Group Takes Victory Lap on Social Media After Violence in Manhattan*, NBC NEWS (Oct. 15, 2018, 5:37 PM), https://www.nbcnews.com/tech/social-media/far-right-group-takes-victory-lap-social-media-after-violence-n920506.

[132] *Id.*

shouted during and after the attack, and upon going viral, the NYPD fell under criticism for not arresting the members of the Proud Boys.[133] The founder of the Proud Boys, Gavin McInnes, has promoted violence among the Proud Boys on the news stating, "I cannot recommend violence enough. It is a really effective way to solve problems."[134] Both McInnes and CRTV, a right-wing online video network that often features McInnes, are verified on Facebook. In fact, CRTV is currently disseminating several ads on Facebook featuring McInnes, and "McInnes' CRTV videos sometimes receive millions of views on the platform."[135]

In another incident on June 30th 2018, members of the Proud Boys took to the streets of Portland, Oregon for a rally where they shouted editorial messages, such as: "[w]hat we should be doing to all the illegals that are jumping over our borders, we smash their heads into the concrete . . . [h]andling business. Separating them from their kids. Making sure they're not with pedophiles and child molesters, people like the left."[136] The rally collapsed and violence took place, with the Proud Boys engaging in physical violence against the leftwing counter-protesters.[137] One video from the violence of that day, features a member of the Proud Boys, Ethan Nordean, knocking out a counter-protester.[138] The Proud Boys see the video as a source of pride, and have used it for a variety of purposes including: recruiting more members, spreading the video throughout social media, incorporating the footage into a "'sizzle reel' of the violence in Portland," and even naming Ethan Nordean as the "Proud Boy of the week" by their magazine.[139]

The result of the spread of this video and their open support of violence towards others, caused the six largest Proud Boys vetting groups on Facebook to see an increase of 70% of recruits seeking to join their hate group.[140] The Facebook group Ethan Nordean is a part of, the "Northwest

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[133] *Id.* (A man who identified himself as Paul Miller, who posted the videos online stated he is not a member of the Proud Boys, however, "[a]s some 20 Antifa protesters shout, 'No Nazis, no KKK, no fascists USA,' Miller said in a YouTube video taken before the event, 'I wanna go over there and instigate it but the cops are here so we'll be nice.' 'I wanna f--- them up real bad, but the cops are here, so.'").

[134] *Id.*

[135] *Id.* ("In one ad, a shirtless McInnes talks about thousands of black Americans who are murdered, saying 'it's not by cops—it's by other black people.'").

[136] David Neiwert, *Freedom to Bash Heads*, THE BAFFLER (July 18, 2018), https://thebaffler.com/latest/freedom-to-bash-heads-niewert.

[137] Jason Wilson, *WHO are the Proud Boys, 'Western Chauvinists' Involved in Political Violence?,* THE GUARDIAN (July 14th, 2018, 2:00 AM) https://www.theguardian.com/world/2018/jul/14/p roud-boys-far-right-portland-oregon.

[138] *Id.*

[139] *Id.*

[140] *Id.*

PB Vetting Page and Trans Positive Safe Space", posted 603 times and added 190 new members thirty days following the Portland rally.[141] Facebook CEO Mark Zuckerberg, stated that the "principles that [Facebook has] on what we remove from the service are: If it's going to result in real harm, real physical harm, or if you're attacking individuals, then that content shouldn't be on the platform,"[142] and that "[w]e do not allow hate groups on Facebook, overall."[143] However, when questioned about the Proud Boys groups on Facebook, Facebook stated that the groups do not violate its policies, despite having such comments leading up to their protest that stated, "WE'RE READY FOR COMBAT AND ANYBODY WHO CHALLENGES US IS GONNA GET IT," and "Wear Kevlar and conceal carry for those licensed to do so."[144]

It is not just the Proud Boys that utilize Facebook, but many other alt-right groups do. One Facebook group titled, "Emperor Trumps Dank Meme Stash," with more than 72,000 members at the time, wrote a post about a Huffington Post reporter asking to vote on whether members would "smash or pass," which lead to harassment in her inbox, vile comments including "threats of sexual violence, rape and insults to mental health sufferers."[145] (see Figure Two, Figure Three).

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[141] Hatewatch Staff, *supra* note 129.

[142] Hatewatch Staff, *supra* note 129.

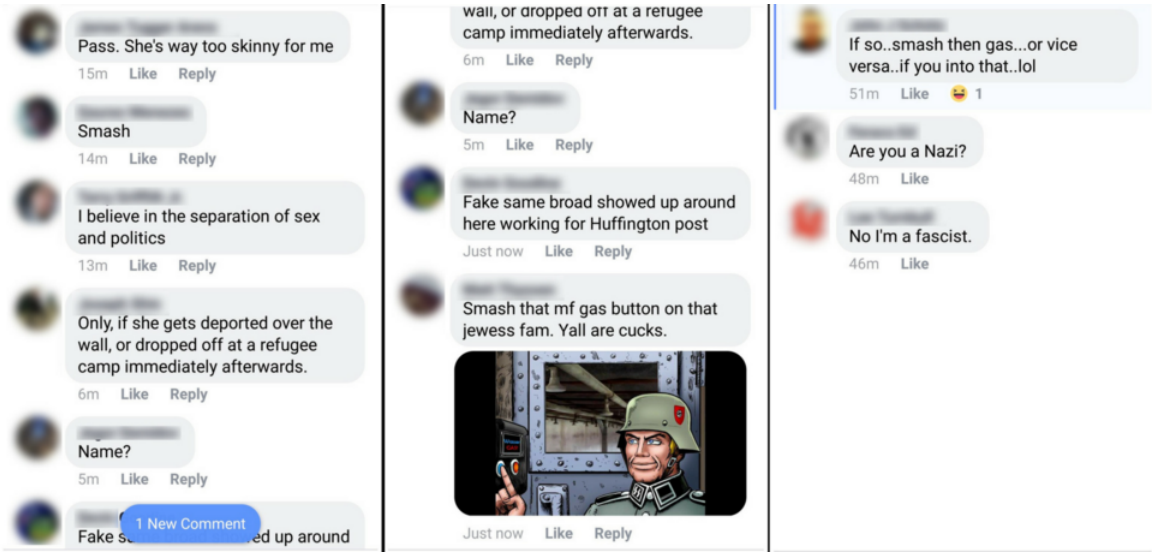
[143] Jesselyn Cook, *Facebook Didn't Seem to Care I Was Being Sexually Harassed Until I Decided to Write About It*, THE HUFFINGTON POST, (Apr. 17th, 2018, 11:05 PM), https://www.huffpost.com/entry/i-was-sexually-harassed-on-facebook_n_5a919efae4b0ee6416a3be76.

[144] Hatewatch Staff, *supra* note 129.

[145] Greg Evans, *It Took Two Months for Facebook To Remove an Alt-Right Group That was Abusing a Female Journalists*, THE INDEPENDENT, (Apr. 23, 2018), https://www.indy100.com/article/facebook-alt-right-group-female-journalist-sexual-abuse-rape-threats-trolls-two-months-8318401.

Figure Two.[146]

Figure Three.[147]



The professional journalist had been contacting Facebook repeatedly asking for action to happen, and for the group to be deleted.[148] It took Facebook

[146] Cook, *supra* note 143.
[147] Cook, *supra* note 143.
[148] Cook, *supra* note 143.

two months to delete the group, suspiciously on the day the journalist asked for comment from Facebook for her article in which she discussed the incident and Facebook's response.[149]

The alt-right are active on Facebook and consistently spread "fake news."[150] Facebook is "a central space for spreading misinformation, as it is a popular location for hyper-partisan news organizations and 'fake news.'" A study of the 2016 election found that articles from hyper-partisan news outlets, 17 out of 20 being pro-Trump or anti-Clinton, inspired more engagement on Facebook than those from mainstream media sources.[151] The private groups on Facebook, like the one mentioned above, shares memes which are then circulated within their personal networks.[152] "The constant creation of image macros allows anons to be agile and iterative, trying many messages and strategies, pursuing those that stick and abandoning unsuccessful tries. The Daily Stormer neo-Nazi blog has a 'Memetic Monday' where they post dozens of such image macros, designed to be shared on Facebook or Twitter."[153]

The alt-right also use Facebook to manipulate the mass media. In one instance, Andrew Anglin, the founder and editor of the self-claimed "World's Most Visited Alt-Right Web Site," "The Daily Stormer," directed his followers to "set up fake White Student Union pages on Facebook for universities throughout the United States—and then contact local media outlets about the groups."[154] The result that Anglin most likely hoped for would be that real white student unions would pop-up on college campuses, as he has openly stated, or that the mass media would grab the story creating more racial tension while showing the mass media's fallibility.[155] Unfortunately, his tactic worked and the media took the race-baiting fake story and spread it, giving it the attention Anglin was hoping for. The story was covered by USA Today, Gawker, The Daily Beast, and The Washington Post.[156] These type of large-scaled, collaborative, group tactic efforts to manipulate the media is something the alt-right uses frequently and with ease, and it is the media's job to not only be aware of this, to ensure reporting accurate stories, but also to do a better job of making Americans aware of the alt-right's tactics.[157]

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[149] Cook, *supra* note 143.
[150] *See* MARWICK & LEWIS, *supra* note 2, at 26.
[151] *See* MARWICK & LEWIS, *supra* note 2, at 21.
[152] *See* MARWICK & LEWIS, *supra* note 2, at 26.
[153] *See* MARWICK & LEWIS, *supra* note 2, at 36.
[154] *See* MARWICK & LEWIS, *supra* note 2, at 50.
[155] *See* MARWICK & LEWIS, *supra* note 2, at 50.
[156] *See* MARWICK & LEWIS, *supra* note 2, at 50.
[157] *See* MARWICK & LEWIS, *supra* note 2, at 51.

i. YouTube

YouTube is another place on the internet, specifically the political section, that is heavily utilized by white supremacists.[158] The majority of the right-wing political messages and profiles are "hard, uncompromising Right, and have been increasingly influenced by their even more extremist counterparts on YouTube."[159] "These days, you can find far-right or white nationalist messages in any genre you like on the world's second most popular website."[160] For example, amateur filmmakers post their own conspiracy "documentaries" to YouTube, spreading further fake news and racist messages outside of the political monologue videos.[161] YouTube's algorithm, "which determines what will autoplay after one video has finished and places recommended videos in the sidebar, also plays a role in coaxing viewers into the deeper depths of the alt-right by presenting them with ever more extreme content."[162] The algorithm also leads individuals that are seeking advice for depression, rejection, and/or social issues to alt-right speakers who slowly bring people over to the extreme viewpoints of the alt-right.[163] To keep users on its site, YouTube "leads viewers down a rabbit hole of extremism."[164] However, some believe that the radicalization happening on YouTube would be occurring regardless of that being true, especially with the polarization happening in the US.[165]

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[158] Jared Holt, *White Supremacy Figured Out How To Become YouTube Famous*, RIGHT WING WATCH (Oct. 2017), http://www.rightwingwatch.org/report/white-supremacy-figured-out-how-to-become-youtube-famous/.

[159] *Id.*

[160] Mack Lamoureux, *How White Power Music Continues to Thrive on YouTube*, VICE (Apr. 9, 2018), https://www.vice.com/en_us/article/xw7gaa/how-white-power-music-continues-to-thrive-on-youtube-v25n1.

[161] Holt, *supra* note 158.

[162] Hatewatch Staff, *Alt Mcinnes Molyneux, and 4chan: Investigating Pathways To The Alt-Right*, S.POVERTY L. CTR. (Apr. 19, 2018), https://www.splcenter.org/20180419/mcinnes-molyneux-and-4chan-investigating-pathways-alt-right.

[163] Paris Martineau, *The Alt-Right Is Recruiting Depressed People*, OUTLINE (Feb. 26, 2018, 2:02 PM), https://theoutline.com/post/3537/alt-right-recruiters-have-infiltrated-the-online-depression-community?zd=2&zi=lv7l7pue ("Type 'depression' or 'depressed' into YouTube and it won't be long until you stumble upon a suit-clad white supremacist giving a lecture on self-empowerment. They're everywhere. For years, members of the alt-right have taken advantage of the internet's most vulnerable, turning their fear and self-loathing into vitriolic extremism, and thanks to the movement's recent galvanization, they're only growing stronger.").

[164] Conor Friedersdorf, *YouTube Extremism and the Long Tail*, ATLANTIC (Mar. 12, 2018), https://www.theatlantic.com/politics/archive/2018/03/youtube-extremism-and-the-long-tail/555350/.

[165] *Id.* ("Maybe YouTube's algorithm does steer heavy users toward metrics like 'hard

Another pocket of YouTube with high alt-right activity is music on YouTube. White power music on YouTube is one of the largest areas of recruitment for White Supremacists.[166] One young man stumbled across a Neo-Nazi song, where he commented asking where he could find more music like it.[167] That same young man would, a mere four months later, walk into a church in Charleston and murder nine black men and women.[168] His name was Dylan Roof, and unfortunately, it is not rare to find that the actors of mass shootings have ties to white power music on YouTube.[169] "In some cases—like Wade Michael Page of the band End Apathy, who walked into a Sikh temple and fatally shot six people in August 2012—the musicians themselves carried out the crimes."[170]

The alt-right YouTube personality channels are also a significant way of radicalizing individuals. James Allsup, a self-identified member of the white nationalist group Identity Evropa, elected Republican official in Washington state, and one of the most popular alt-right YouTube Personalities, uses his account to "promote identitarianism, denigrate feminism and fight 'anti-white racism.'"[171] Allsup "has used his YouTube channel to host openly white supremacist guests such as Baked Alaska, an internet troll who regularly espouses Nazi propaganda memes, to sympathize with white nationalist alt-right figure Richard Spencer, and to deliver outlandish responses to discussions about white privilege."[172] Allsup was radicalized in part by online videos of Jared Taylor, the white supremacist founder of the New Century Foundation, which "has been, according to the foundation's tax forms, intimately related to the [Council of Conservative Citizens] through 'common membership, governing bodies, trustees and officers.'"[173] The Council of Conservative Citizens is a

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core' or 'inflammatory' to raise engagement. But rereading 'The Long Tail,' it strikes me that a YouTube radicalization effect would manifest even without that being true. YouTube clearly monetizes 'the long tail' in much the same way as did Amazon and iTunes. Doesn't it make sense that, like those sites, most paths one might go down on a platform that wants to exploit its long-tail advantages would start with what is relatively mainstream before leading inevitably to what is less so?").

[166] Lamoureux, *supra* note 160 ("YouTube has become the "new talk radio" for the far right, and it's been similarly useful as a stage for the otherwise uncommercial and politically toxic white power music to flourish.").

[167] Lamoureux, *supra* note 160.

[168] Lamoureux, *supra* note 160.

[169] Lamoureux, *supra* note 160 ("[S]ome of the worst far-right terrorists in modern history, from Roof to Anders Behring Breivik, were influenced by white power music in some way.").

[170] Lamoureux, *supra* note 160.

[171] Hatewatch Staff, *supra* note 162.

[172] Holt, *supra* note 158.

[173] Jared Taylor, S. POVERTY LAW CTR., (2017), https://www.splcenter.org/fighting-

"white supremacist group that has described black people as 'a retrograde species of humanity.'"[174] "Roof's manifesto cited the CCC's propaganda on supposed black-on-white hate crimes as one of the motivations for his murders," and Taylor was on TV the following days as the spokesman for the CCC.[175]

The interconnection of the white supremacist organizations is incredibly dense, and YouTube is one of the doorways to it.[176] The alt-right videos on YouTube is a major recruitment site for the different organizations tied to the alt-right, and YouTube is clearly at a loss of how to appropriately manage the situation.[177] These large social media sites have allowed themselves to grow, without being able to properly stop the spread of the white supremacists.[178]

ii. Twitter

Twitter is another online platform that members of the alt-right, including Jared Taylor (see Figure 4), use to spread hate while recruiting individuals to radicalize them.[179] Followers of White Nationalist Organizations on Twitter have grown collectively from 3,542 in 2012 to 25,406 by 2016, a 600 percent increase.[180] However, little attention is paid to this threat due to the government and media inaccurately mischaracterizing the violence as being a mental health issue and not domestic terrorism.[181]

One way the alt-right grow and recruit through Twitter is through trolling, making unsolicited or provocative statements with the aim of upsetting someone, and bots, fake accounts used to control the algorithm on platforms through likes, retweets, and views, and to spread hate messages from multiple profiles. Andrew "Weev" Auernheimer, a notorious hacker and internet troll, exploited Twitter's "promoted tweets" feature in 2015, to

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hate/extremist-files/individual/jared-taylor.

[174] *Id.*

[175] *Id.*

[176] Lamoureux, *supra* note 160.

[177] Lamoureux, *supra* note 160.

[178] MARWICK & LEWIS, *supra* note 2 at 22.

[179] MARWICK & LEWIS, *supra* note 2 at 22.

[180] Stephanie Pappas, *Psychology of Hate: What Motivates White Supremacists?*, LIVE SCI. (Aug. 17, 2017), https://www.livescience.com/60157-what-motivates-white-supremacists.html.

[181] Metzl & Macleish, *supra* note 16.

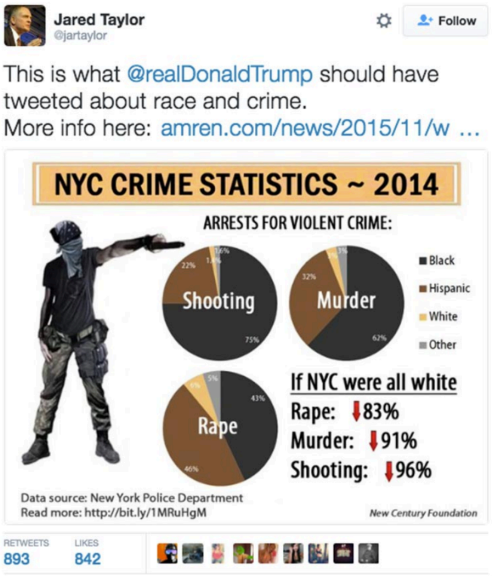

Figure Four. ROSE FALVEY, *Twitter Bans Prominent Alt-Right Accounts But Other Hate Group Leaders Remain*, SOUTHERN POVERTY LAW CENTER, (Nov. 18, 2016), https://www.splcenter.org/hatewatch/2016/11/18/twitter-bans-prominent-alt-right-accounts-other-hate-group-leaders-remain

Figure Five. ROSE FALVEY, *Twitter Bans Prominent Alt-Right Accounts But Other Hate Group Leaders Remain*, SOUTHERN POVERTY LAW CENTER, (Nov. 18, 2016), https://www.splcenter.org/hatewatch/2016/11/18/twitter-bans-prominent-alt-right-accounts-other-hate-group-leaders-remain

spread hate and bring more attention to white supremacists' messages.[182] Andrew's profile on Twitter spread racist and anti-Semitic messages (see Figure 5). Andrew is also known for his radical anti-feminism beliefs, making statements such as, "'[r]ape is a property crime and nothing more'. . . [i]f you are opposing WHITE SHARIA because you disagree with women being reduced to the status of property to be beaten and fucked at the whims of her husband, you are a faggot and a cuckold and have no place in any right-wing site."[183] Despite his horrifying beliefs, Andrew was allowed to have a platform to share these beliefs with others.[184]

The alt-right also use shock tactics and harassment on Twitter frequently. Milo Yiannopoulos, "dubbed an "Internet supervillain' by Out magazine, built a personal brand by strategically outraging the media through Twitter harassment and other shock tactics."[185] The shock tactics were paying off, as evidence by Milo getting a $250,000 book deal with "an

[182] Metzl & Macleish, *supra* note 22.

[183] Keegan Hankes & Alex Amend, *The Alt-Right Are Killing People*, S. POVERTY L. CTR. (Feb. 5, 2018), https://www.splcenter.org/20180205/alt-right-killing-people.

[184] *Id.*

[185] MARWICK & LEWIS, *supra* note 2, at 31.

imprint of Simon & Schuster and went on a college campus speaking tour specifically designed to generate attention out of outrage (the book deal was later cancelled after a video surfaced in which he defended pedophilia)."[186]

The alt-right will concoct plans to increase visibility on Twitter with hashtags and other forms of trolling.[187] The alt-right will join together to activate large amounts of fake accounts, and manipulate popular hashtags such as #BlackLivesMatter to "diminish[] the ability of supporters to use the hashtag to find each other."[188] In one instance, Alt-right blogger Mike Cernovich, used Twitter to falsely spread the theory that four Chicago teens who had filmed themselves torturing a mentally disabled man, were Black Lives Matter supporters by getting a large amount members of the alt-right to tweet the hashtag #BLMKidnapping.[189] "[I]t was used 480,000 times in twenty-four hours and trended across the United States. While police and BLM advocates decried the connection, the theory spread widely and was mentioned in most of the mainstream media stories about the kidnapping."[190]

Bots and trolls are often used to spread disinformation and hate-speech on Twitter. One study "identified 400,000 bots responsible for posting about 3.8 million tweets during the last month of 2016 U.S. presidential elections."[191] Another study found that "during the first presidential debate, bots generated 20% of the Twitter posts about the debate, despite representing only 0.5% of users. Significantly more of this traffic came from pro-Trump bots than pro-Clinton bots," which stayed consistent during the election.[192] "Many of these bots spread what is known as "computational propaganda": misinformation and negative information about opposition candidates.[193] Another reported that "humans are vulnerable to this manipulation, retweeting bots who post false news bots."[194] Bots and unknowing humans will retweet the fake news and hateful comments from the alt-right to popularize/increase visibility and to spread propaganda that leads to further polarization within the US.[195]

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[186] MARWICK & LEWIS, *supra* note 2, at 31.
[187] MARWICK & LEWIS, *supra* note 2, at 35.
[188] MARWICK & LEWIS, *supra* note 2, at 35.
[189] MARWICK & LEWIS, *supra* note 2, at 36.
[190] MARWICK & LEWIS, *supra* note 2, at 36.
[191] JOSHUA A. TUCKER ET AL., SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE, (William and Flora Hewlett Found, Mar. 2018).
[192] MARWICK & LEWIS, *supra* note 2, at 38.
[193] MARWICK & LEWIS, *supra* note 2, at 38.
[194] MARWICK & LEWIS, *supra* note 2, at 32.
[195] MARWICK & LEWIS, *supra* note 2, at 32.

ii. Reddit/4Chan/Other Sites

Alt-right leaders have explicitly stated that the alt-right uses sites like 4chan, 8chan, and Reddit to troll others online, spread their hate messages, and recruit more members to their cause.[196] 4chan and Reddit have had a significant impact on recruitment for the alt-right:

> Many of those who were eventually radicalized by 4chan came there relatively innocently. One user said memes led them to 4chan in the mid-2000s, but they eventually found their way to overtly racist /pol/ after Obama was elected for a second term. Others noted they "ironically" looked at /pol/, or they were led there by the more absurdist "random" board, /b/. One wrote that their friend, who they specified was not right-wing, told them to "surf /pol/ for fun." "Humor is a powerful drug," explained a poster who came for the political discussions but "stayed for the racist memes." Alongside /pol/, Reddit was another crucial space in the growth of the alt-right—especially the infamous subreddit r/The_Donald, that arose in support of Donald Trump's presidency. For some who came to the movement around 2015, it was the first place they went. "I've been an openly racist nigger hater since 2010, but I just didn't know where to find content that was explicitly racist until I stumbled onto T_D and was able to find other stuff from there.[197]

Outside of the main social media, the alt-right also have their own websites, such as The Daily Stormer, which is used to spread messages to infiltrate social media even more. For example, The Daily Stormer, a white extremists' news site, posted an article called, "How to be a Ni**** on Twitter," which tells members how to create fake Twitter accounts of black people to "create a state of chaos on twitter, among the black twitter population, by sowing distrust and suspicion, causing blacks to panic."[198]

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[196] MARWICK & LEWIS, *supra* note 2, at 4.

[197] Hatewatch Staff, *supra* note 129.

[198] Neha Rashid, *The Emergence Of The White Troll Behind A Black Face*, NPR (Mar. 21, 2017), https://www.npr.org/sections/codeswitch/2017/03/21/520522240/the-emergence-of-the-white-troll-behind-a-black-face.

There are many ways in which the alt-right utilizes the internet to form plans and encourage violence.

In the online world, hacking groups compete to up-end one another, due to the shifting leadership, with the boldest hackers dominating.199 This encourages even more bold and aggressive tactics, where caution is thrown to the wind.[200] The more aggressive, dangerous, and bold a person's actions are, the more they are rewarded.[201] This pushes the isolated individual online, who is seeking admiration and belonging from his peers, to engage in reprehensible actions in the "real" world.[202] This is also true of messages represented in the alt-right online world.

Members of the alt-right incite and encourage violence within their groups. Unfortunately, because the individuals that are recruited have psychosocial issues and a need for acceptance, these statements become actions. Any emotionally vulnerable person in the alt-right that continues to have negative interactions with the "outside world" can read the messages of fear and the need to be bold, and they will take it to the extreme. And many do.[203]

The use of social media to radicalize individuals to join the alt-right or to spread messages of hate is normalized, and there is very little attention drawn to it. When discussing this issue, many rely on the First Amendment to justify not taking action to stop these users from inciting violence. Furthermore, the general public does not grasp how complex and planned the alt-right's manipulation of these platforms are. Part of this is due to the government and media failing to condemn and call out these actors, while another part is due to Americans being misled about where the violence is actually coming from. The political climate is another factor in the normalization of hate speech, racism, and sexism.[204] If every alt-right domestic terrorist attack was described by the media as being domestic terrorism to advance white supremacy, then more Americans would likely put more social pressure on the legislators and social media companies

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[199] Post, *supra* note 73, 261.

[200] Post, *supra* note 73, 261.

[201] Post, *supra* note 73, 261.

[202] Post, *supra* note 73, 261.

[203] Hankes & Amend, *supra* note 205.

[204] MARK A. WALTERS, RUPERT BROWN & SUSANN WIEDLITZKA, CAUSES AND MOTIVATIONS OF HATE CRIME (Equal. and Human Rights Comm'n Research Report 102. 2016) ("Some researchers assert that hate crimes are more likely to occur where society is structured in such a way as to advantage certain identity characteristics over others (for example, white, male, heterosexual). Systemic discrimination, typically codified into operating procedures, policies or laws, Causes and motivations of hate crime may give rise to an environment where perpetrators feel a sense of impunity when victimizing [sic] certain minority group members.") (internal parenthesis in original).

requiring them to take actions to prevent the growth and spread of the alt-right's recruitment and hate-fueled violence. Unfortunately, instead of naming the attacks for what they are, the government and media are quick to give these attacks an out: mental illness.

III. THE ALT-RIGHT COMMITS ACTS OF DOMESTIC TERRORISM, AND IS NOT HELD ACCOUNTABLE DUE TO THE MEDIA AND GOVERNMENT MISLABELING THE ATTACKS AS BEING THE RESULT OF MENTAL ILLNESS, WHEN IT IS REALLY DUE TO HATE AND RADICALIZATION FROM THE ALT-RIGHT

"As a society, we have a responsibility to reject reductionist explanations for mass shootings. The burden of untreated serious mental illness is expressed more often in human problems, not in acts of violence . . . . Reducing the risk of mass shootings and improving mental health care are two different issues and should not be conflated."[205]

Following the several recent mass shootings in the United States, policymakers, journalists, and the public are calling for more attention be given to mental health care to prevent future attacks,[206] including President Trump calling for Americans to report to the police, arguably profile, "mentally disturbed" people.[207] President Trump, politicians, and the media continuously repeat the false narrative that mental illness is the root of the problem after each shooting, despite the lack of empirical evidence to support it.[208] This language perpetuates the stereotype that individuals with mental health diagnoses are dangerous and violent. This stereotype compromises recovery prospects of individuals with mental illness and thus their quality of life.[209] Individuals with mental illness feel further pigeon-holed, and those with mental illness that are not in services are less likely to seek help, leaving their mental health symptoms untreated, for fear of being labeled as a danger to society.[210]

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[205] Matthew E. Hirschtritt & Renee L. Binder, *A Reassessment of Blaming Mass Shootings on Mental Illness*, 75(4) JAMA PSYCHIATRY 311–12 (2018).

[206] Metzl & Macleish, *supra* note 16.

[207] Katie Rogers, *After Florida Shooting, Trump Focuses on Mental Health Over Guns*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/trump-florida-shooting-guns.html.

[208] Justin Worland, *Donald Trump Blamed the Florida School Shooting on Mental Illness. Here's What He's Done on the Issue*, TIME (Feb. 15, 2018), http://time.com/5160917/florida-school-shooting-donald-trump-mental-health/.

[209] Hirschtritt & Binder, *supra* note 205.

[210] Hirschtritt & Binder, *supra* note 205.

A diagnosis of a serious mental illness (SMI)211 is not an indicator or a predictor for risk of acts of violence.[212] There is no evidence to support the claim that mental health leads to an increase in mass shootings; instead, the individual's psychosocial issues and group psychology has a significantly higher correlation to acts of violence than mental illness does.[213] It is difficult for the general population to accept the idea that someone that is willing to walk into an elementary school, church, or movie theatre and open fire on innocent people could have done so while being "sane," but that is exactly what is happening.

Only 4% of violence in the U.S. can be attributed to individuals with mental illness,[214] and the percentages of individuals with mental illness that commit crimes involving guns are lower than the national average for persons not diagnosed with mental illness.[215] Between 2001 and 2010, there were 120,000 gun-related killings in the United States, and less than 5% of those gun-related killings were perpetrated by people diagnosed with mental illness.[216] Studies have shown that individuals with serious mental illness are three times more likely to be victims of violence than they are perpetrators, and those that do engage in violence rarely do so at a lethal level.[217]

Furthermore, having a mental health diagnosis does not create causation, only correlation.[218] A study done by the American Psychological showed that, of those with SMI that committed crimes, only 7.5% did so as a direct result of the symptoms of their mental illness.[219]

The study evaluated the direct causation of a person with SMI that experienced symptoms immediately preceding the crime that increased its likelihood of occurrence, i.e. a diagnosed schizophrenic hearing voices which he/she acts on that leads to a crime being committed, compared to normative traits, emotional and personality aspects of the crimes committed by people with SMI, i.e. a diagnosed schizophrenic robbing a store while non-symptomatic and independent of his/her mental health diagnosis.[220]

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[211] Hirschtritt & Binder, *supra* note 205. ("Serious Mental Illness (SMI)" includes major depression, bipolar disorder, and schizophrenia spectrum disorder as defined in the DSM).

[212] Hirschtritt & Binder, *supra* note 205.

[213] Chermak et al., *supra* note 27.

[214] Hirschtritt & Binder, *supra* note 205.

[215] Metzl & Macleishl, *supra* note 16, at 241-42.

[216] Metzl & Macleishl, *supra* note 16, at 241-42.

[217] Hirschtritt & Binder, *supra* note 205.

[218] Jillian Peterson, et. al., *How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders With Mental Illness?*, 38(5), L. AND HUMAN BEHAV. 439, 445-446 (2014).

[219] *Id.* at 444.

[220] *Id.* at 439.

The study found that individuals with SMI rarely commit crimes based on their symptoms, and that that there is no "subgroup of offenders with mental illness who only engage in criminal behavior when their symptoms directly cause such behavior."[221] This means that those with SMI that commit crimes do so independently of their mental illness as well, indicating that previous studies "may in fact have identified a group of people that commit 'direct crimes' [related to their SMI symptoms] only some of the time."[222]

The study also pointed out the difficulty of distinguishing traits of a SMI from normative personality traits and emotional states that are often present with individuals committing a crime, i.e. impulsivity, anger, antisocial traits, irritability, emotional instability, etc.[223] It is difficult to analyze whether anger, a normal and experienced human emotion, stems from an individual's psychosis or is independent of it.[224] This is an important factor to take in when trying to truly evaluate the propensity of mental illness leading to crimes because anger is a high-risk factor for violence among both general offenders and individuals with a SMI diagnosis.[225] However, even when including emotional states as being part of the individual's SMI symptoms, the results still indicate that mental illness is not the main factor or predictor to violent crime.[226]

It is also an established fact that terrorist groups regularly screen out mentally unstable individuals, because they see a mentally ill individual as a security risk.[227] It is not the mentally ill that are sought after in these terrorist organizations, but rather the emotionally vulnerable and those most susceptible to group mentality and pressure.[228]

> The effect of large group dynamics in fostering regression from higher mental functioning to more primitive mental states is also important in understanding terrorism. Rational thought gives way to powerful affects and impulses that dominate terrorist behavior. This amounts to a loss of reflective capacity or mentalization and a regression to more infantile modes of thinking . . . . Such powerful group dynamics and severe regression may lead to a process of dehumanization in which human victims are treated as inanimate objects to be disposed of indiscriminately.

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[221] *Id.* at 446 (emphasis added).
[222] *Id.* (emphasis in original) (alteration added).
[223] *Id.* at 440.
[224] *Id.*
[225] *Id.*
[226] *Id*.
[227] Post, *supra* note 73, at 247.
[228] SIMI, ET AL., *supra* note 3, at 59-60.

> Dehumanization is directed against the natural human inclination towards empathy and remorse, as well as self-concern. In terrorism, the perpetrators themselves are subject to a process of dehumanization, which is utilized as a deliberate ego strategy in suicide bombers to produce a dehumanized self as a lethal weapon delivery system (Akhtar, quoted in Hough, 2004). Such violence is motivated by a state of mind in which the capacity to think and symbolize is absent.[229]

Why is it so difficult for Americans to accept that people are capable of great harm, through group psychology, rather than being a "bad person" or "mentally ill"? This is, in part, because it is a larger reflection of anxiety about accepting that even they themselves could be capable of that level of violence if placed under the right conditions and recruited through slow group acceptance.

Think of the well-known Stanford Prison Experiment, where twenty-four, psychologically stable and healthy men were put into a role of either prisoners or guards. A majority of those in the role of the guards almost immediately became sadistic and cruel, which only increased as the experiment continued, despite not carrying those beliefs or condoning violence outside of the experiment. Ultimately, the experiment was terminated early, on day six, due to the physical, psychological, and emotional toll it had on the participants. Even after the experiment, some of the participants that were guards had psychological and emotional trauma from trying to grapple with the idea that they so easily became someone they did not see themselves as. The research leader, Phillip Zimbardo, stated he wanted to do the experiment because

> [He] had been conducting research for some years on deindividuation, vandalism and dehumanization that illustrated the ease with which ordinary people could be led to engage in anti-social acts by putting them in situations where they felt anonymous, or they could perceive of others in ways that made them less than human, as enemies or objects.[230]

While this experiment is currently under scrutiny for its findings, due to the belief Mr. Zimbardo told participants to be cruel, it helps to illustrate

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[229] J. Reid Meloy & Jessica Yakely, *The Violent True Believer as a "Lone Wolf" - Psychoanalytic Perspectives On Terrorism*, 32 BEHAV. SCI. & L. 347, 350 (2014).

[230] Kathleen O'Toole, *The Stanford Prison Experiment: Still Powerful after all these years*, STAN. U. NEWS (Jan. 8, 1997) (quoting Zimbardo from a Toronto symposium in 1996).

the idea that normal people can be influenced by a variety of factors to become something they usually would never picture themselves becoming. Another part of the anxiety of accepting these actions as terrorism is related to larger social issues. Jonathan M. Metzl, the Director at Vanderbilt Center for Medicine, Health, and Society, conducted a study on mental illness and gun violence and found that the societal focus on mental illness after gun violence occurs is a reflection of "larger cultural stereotypes and anxieties about matters such as race/ethnicity, social class, and politics."[231] The study reported that, in the context of gun violence, the term "mentally ill" "ceases to be a medical designation and becomes a sign of violent threat."[232] When we use the term "mentally ill" to try and encompass or rationalize how an individual could commit such violent acts, it leads to further inaccurate stigmatization and causes the public to believe violence is symptomatic of mental illness, which we know it is not. This concept is challenging for individuals to accept because there is anxiety accepting that someone that looks like you (white American) is capable of committing those types of acts; meanwhile, individuals that are part of minority groups that commit domestic terrorism in the US do not receive the same benefit of being excused by mental illness.

The anonymity of the internet is a breeding ground for leading individuals to engage in anti-social acts, and the psychological profile of the alt-right shows the high levels of dehumanization that contributes to the lack of guilt, or social pressure to not engage in violence, by those that commit these horrific acts. The effects of this combination show the ease in which ordinary people commit horrific acts in our country.

The stereotyping of mental illness creates a false representation of what mental illness is and places an undue burden on clinicians.[233] Labeling the problem as mental illness creates a societal pressure and blame on clinicians to make decisions about gun ownership, despite the amount of evidence that shows no correlation between gun violence and mental illness. It places responsibility on a clinician to not only determine a diagnosis, knowing the impact it could have on a person's gun rights, but it also requires professionals to carry the burden of trying to impossibly predict and report clients that could be involved in mass gun violence.[234] It also creates an unfair level of liability on clinicians for failure to predict gun violence.[235] Numerous studies have indicated that mental health diagnoses cannot predict gun violence, and that additional resources focusing on mental

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[231] Metzl & Macleishl, *supra* note 16, at 240.
[232] Metzl & Macleishl, *supra* note 16, at 240.
[233] *See generally* Metzl & Macleish, *supra* note 16.
[234] Metzl & Macleishl, *supra* note 16, at 241-43.
[235] Metzl & Macleishl, *supra* note 16, at 241-43.

health, while needed in general for the betterment of society, will not prevent another mass shooting.[236]

Attributing mass shootings to untreated SMI "stigmatizes an already vulnerable and marginalized population, fails to identify individuals at the highest risk for committing violence with firearms, and distracts public attention from policy changes that are most likely to reduce the risk of gun violence."[237]

The tendency to blame shootings on untreated serious mental illness causes the public and policies to not fully address or explore other contributing factors, such as social-emotional issues, groupthink, and access to firearms, limiting the chances of getting a holistic approach to treat this very serious problem of domestic terrorism and home-grown violence.[238] Until we accept that mental health is not the cause of the increase in domestic terrorism, and look to the extremist groups that are radicalizing these individuals, the violence will not end. There are many individuals that have a mental health diagnosis that are not contributing to mass violence, but there are individuals that all have ties and strong beliefs to the alt-right that are committing horrific acts of violence at a significantly worrying rate. Placing a ban on buying guns for those that have a mental health diagnosis, and blaming mental illness for the rise in violence, will not solve the problem. It distracts from the problem.

While the nation is focused on untreated SMI, the alt-right domestic terrorist organizations are growing and committing more violent acts without any true scrutiny.[239] Without intervention to their plans, the alt-right is openly and easily able to seek out and recruit socially and emotionally vulnerable individuals to commit acts on their behalf.[240] It is the responsibility of the government and media to accurately represent the threats to our country, and the government must protect its citizens instead of protecting the white supremacists.

IV. THE ALT-RIGHT ARE EMPOWERED AND GROWING THROUGH THE MEDIA AND GOVERNMENT'S UNWILLINGNESS TO ADDRESS THE REAL CAUSES OF INCREASED VIOLENCE: WHITE SUPREMACISTS

On October 27th, 2018, a member of the alt-right walked into a synagogue and committed the deadliest mass shooting against the Jewish

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[236] Metzl & Macleishl, *supra* note 16, at 246.
[237] Hirschtritt & Binder, *supra* note 205, 311–12.
[238] Hirschtritt & Binder, *supra* note 205, 311–12.
[239] Horgan, *supra* note 124, at 199–204.
[240] SIMI, ET AL., *supra* note 3, at 59-60

community in the United States, killing eleven people and wounding six people, including four police officers. The murderer had been consistently posting anti-immigrant and anti-Semitic hate messages and conspiracy theories on Gab, a social media site that is frequently used by white supremacists.[241] Earlier that same week, a right-wing extremist sent at least thirteen pipe bombs to Democrats and President Trump's most prominent critics and frequent targets, including CNN.[242] The man charged for the pipe bombs, Cesar Sayoc Jr., lashed out at immigrants, gun control advocates, and prominent Democratic politicians on Twitter.[243] He made threats against Joe Biden that included photos of Biden's home and family, shared inflammatory stories from Breitbart and Fox News, lived in a van covered in anti-democrat and pro-Trump stickers (see Figure 6), and posted photos in his "Make America Great Again" hat at a Trump rally while holding a sign targeting CNN (see Figure 7).[244] Mr. Sayoc even has a criminal history, including a charge of making a bomb threat.[245] How did these men perform their attacks after openly making threats and spreading hate and conspiracy messages online?

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[241] Trip Gabriel, Jack Healy & Julie Turkewitz, *Pittsburgh Synagogue Massacre Suspect Was 'Pretty Much a Ghost'*, N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/us/pittsburgh-shooting-robert-bowers.html?module=inline.

[242] Cleve R. Wootson Jr. & Alex Horton, *What We Know About The 13 Pipe Bombs Sent To Prominent Democrats And Trump Critics*, WASHINGTON POST (October 28, 2018), https://www.washingtonpost.com/nation/2018/10/25/bomb-timeline-list-people-targeted-with-packages-devices/?utm_term=.598c4548c42a.

[243] Patricia Mazzei, Nick Madigan & Frances Robles, *Living in a Van Plastered With Hate, Bombing Suspect Was Filled With Right-Wing Rage*, N.Y. TIMES (Oct. 26, 2018), https://www.nytimes.com/2018/10/26/us/cesar-sayoc-bombing-suspect-arrested.html.

[244] *Id.*

[245] Vanessa Romo, *Who is Cesar Sayoc? Bomb Suspect Has Criminal Hisotry, Attached Democrats Online*, NAT'L PUB. RADIO (Oct. 26, 2018), https://www.npr.org/2018/10/26/661183126/pipe-bomb-suspect-cesar-sayoc-had-criminal-history-regularly-attacked-dems-online.

Figure Six. COASTON, J., *The pipe Bomb Suspect's Van, Explained,* VOX (Oct. 27, 2018) *https://www.vox.com/2018/10/27/18027426/pipe-bomb-clinton-obama-van-memes-trump*

Figure Seven. MAZZEI, P., MADIGAN, N., & ROBLES, F., *Living in a Van Plastered With Hate, Bombing Suspect Was Filled With Right-Wing Rage*, THE NEW YORK TIMES (Oct. 26, 2018) *https://www.nytimes.com/2018/10/26/us/cesar-sayoc-bombing-suspect-arrested.html*

While the nation focuses on radical jihadist,[246] right-wing extremist violence represents "the oldest and most persistent form of terrorism in the United States and surprisingly the deadliest form of extremism in the US since 9/11. In fact, since 9/11 right-wing extremists have killed more Americans on US soil than jihadi extremists by almost two-to-one."[247] From 1990 to 2010, far-right extremist groups were involved in over 335 homicide incidents that claimed 560 lives.[248] Between 1995 and 2005, sixty planned and/or attempted terrorist plots were linked to far-right extremists.[249] A joint bulletin from the FBI and the Department of Homeland Security reported that the number of homicides committed by white supremacists from 2000 to 2016 was "more than any other domestic extremist movement."[250] "[F]rom September 12, 2001 through December

[246] Daryl Johnson, *I Warned of Right-wing Violence in 2009. Republicans Objected. I was Right.*, WASHINGTON POST, (Aug. 21, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/i-warned-of-right-wing-violence-in-2009-it-caused-an-uproar-i-was-right/?utm_term=.a15d66bcee26 ("[T]he body count from numerous acts of violent right-wing terrorism continued to rise steadily with very little media interest, political discussion or concern from our national leaders. As this threat grew, government resources were scaled back, law enforcement counterterrorism training was defunded and policies to counter violent extremism narrowed to focus solely on Muslim extremism.")

[247] Simi, *supra* note 3, at 5.

[248] Chermak et. al., *supra* note 27, at 4.

[249] Chermak et. al., *supra* note 27, at 5.

[250] JOINT INTELLIGENCE BULLETIN, *White Supremacist Extremism Poses Persistent Threat of Lethal Violence*, FBI & DHS, (May 10, 2018), https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html.

31, 2016, attacks by domestic or 'homegrown' violent extremists in the United States resulted in 225 fatalities . . . ."[251] The latest FBI report shows that, for the third year in a row, hate crimes are increasing, with a 17% increase from 2016-2017.[252]

How is the growth within white supremacist groups able to occur when they are such a significant threat to our public's safety? A few of the major causes are: the government's refusal to label white supremacists as terrorists, the current political climate that encourages violence and racist attitudes, the protection the courts have placed on first amendment rights at the cost of others safety, and the lack of awareness of the public due to the inaccurate stereotyping and description of the threats and violence propagated by the media. These factors insulate white supremacists from real consequences, stigmatizes minority groups, provides a false narrative to the public about the threat to their safety, allows white supremacists to recruit more individuals online with ease, protects their hate speech and propaganda, and stops government departments from utilizing resources that would stop future attacks.

A. Social Media and Mass Media

On April 29, 1995, a white supremacist carried out a "bombing of the Murrah federal building in Oklahoma City, which killed 168 people and injured another 680."[253] It was the most damaging domestic terrorist attack on American soil.[254] The media immediately began speculating that the attack was committed by Islamic radical terrorists.[255] On November 6, 2018

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[251] United States Government Accountability Office, *Countering Violent Extremism: Actions Needed to Define Strategy and Assess Progress of Federal Efforts*, REPORT TO CONGRESSIONAL REQUESTERS 3 (2017), https://www.gao.gov/assets/690/683984.pdf.

[252] John Eligon, *Hate Crimes Increase For the Third Consecutive Year, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html.

[253] David Neiwert, *Alt-America: The Time for Talking About White Terrorism is Now*, GUARDIAN (Nov. 26, 2017), https://www.theguardian.com/world/2017/nov/26/alt-america-terrorism-rightwing-hate-crimes.

[254] *Id.*

[255] *Id.*; Norris, *supra* note 13, at 263. ("Even after McVeigh and his accomplice Terry Nichols had been identified as the perpetrators of the Oklahoma City bombing and were due to stand trial in federal court, some, like Laurie Mylroie, former Harvard professor and Iraq consultant to Bill Clinton during the latter's presidential campaign, continued to espouse the theory that Saddam Hussein was involved in the bombing plot. According to Mylroie, Nichols was working with Ramzi Yousef—one of the chief plotters of the 1993 World Trade Center bombing—whom Mylroie has accused of being a secret Iraqi agent. On top of that, in preparing for trial, McVeigh's own lawyer, Stephen Jones, clashed with U.S. District Judge Richard Matsch over Jones' desire to "link the bombing to Osama bin Laden and other Arab terrorists [and] to Ramzi Yousef, mastermind of the World Trade

a white American male and former Marine, murdered twelve innocent people at a country western bar in Thousand Oaks, California.[256] Within twenty-four hours after the shooting, a local news anchor reported and tweeted that the suspect was described as, "as middle eastern looking with a beard."[257] A recording of the interview was broadcasted on CNN and shared nationally.[258] After a terrorist attack in Canada, FOX News incorrectly tweeted that the suspect was of Moroccan origin.[259] Justin Trudeau, Canadian's Prime Minister, had his spokeswoman send an email to FOX News condemning them for the tweet, stating, "[t]hese tweets by Fox News dishonor the memory of the six victims and their families by spreading misinformation, playing identity politics, and perpetuating fear and division within our communities. . . ." [Painting] "terrorists with a broad brush that extends to all Muslims is not just ignorant—it's irresponsible.""[260] Almost two decades after the misrepresentation of an act of mass violence in the US, the media continues to create racial tension and reinforce Islamophobia in America by falsely flagging these terroristic acts as being committed by a "Muslim" or a "middle-eastern looking" person. It is this narrative that the media pushes that is a large factor in causing Americans to misunderstand the true threat against them today.

The mainstream media is helping the growth of the alt-right by inaccurately reporting events, continuing to perpetuate racist stereotypes, and misrepresenting the causes of the recent mass shootings and increase in violence across the U.S.[261] The media, both conservatives and the mainstream media, downplay the violence committed by white supremacists by over-covering acts of violence committed by minority groups and removing responsibility of intentional actions of white

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Center bombing.").

[256] Nahila Bonfiglio, *12 Dead In Thousand Oaks After Gunman Opens Fire At College Bar*, DAILY DOT (Nov. 7, 2018), https://www.dailydot.com/layer8/thousand-oaks-shooting-california/.

Nahila Bonfiglio, *12 Dead In Thousand Oaks After Gunman Opens Fire At College Bar*, DAILY DOT (Nov. 7, 2018), https://www.dailydot.com/layer8/thousand-oaks-shooting-california/.

ooter-white-middle-eastern/.

[258] *Id.*

[259] Jessica Schladebeck, *Justin Trudeau Pressures Fox News into Deleting Incorrect Quebec Mosque Shooting Tweet*, N.Y. DAILY NEWS (Feb. 02, 2017), http://www.nydailynews.com/news/world/justin-trudeau-forces-fox-news-delete-incorrect-quebec-tweet-article-1.2962251.

[260] *Id.*

[261] Caroline M. Corbin, *Essay: Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda,* 86 FORDHAM L. REV. 455, 456 (2017).

supremacists by labeling them as mentally ill.[262] Almost every year far-right extremists commit the highest number of US political murders, and yet, Muslim perpetrators receive 357% more news coverage.[263] It is often relayed in messages, in the news and movies, that the main group of people associated with terrorism is Muslim individuals, and that white individuals are not terrorists, despite white supremacists being the deadliest domestic terrorist group since 9/11.[264] One explanation for the quick response to blame Muslim extremists is that the public is afraid and emotional after a horrific act of violence, and they want immediate answers, despite it taking months to unravel the truth behind the reason and group behind the attack.[265] Therefore, the media resorts to what is quick and familiar with the public by blaming outside terrorist organizations, primarily Muslim extremists.[266]

These stereotypes feed into the news propaganda now frequently seen online, and it makes Americans less secure and vigilant.[267] When the media does address the mass violence committed by white supremacists, it paints the issue as being a mental health issue, instead of what it almost always is: an act of alt-right radicalization and violence.[268] Muslims are immediately

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[262] Kearns et. al, *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, JUST. Q. (Apr. 2, 2018), http://dx.doi.org/10.2139/ssrn.2928138. (By giving Muslim perpetrators 357% more news coverage, the media is creating the perception that attacks by Muslims are occurring at a higher frequency than other when in fact white supremacists commit violence at a much higher rate.); Hirschtritt & Binder, Supra note 205 at 311–12.

[263] *Id.* at 21.

[264] Schladebeck, *supra* note 259; Corbin, *supra* note 261, at 456 ("In the United States, two common though false narratives about terrorists who attack America abound. We see them on television, in the movies, on the news, and currently, in government policy. The first is that 'terrorists are always (brown) Muslims.' The second is that 'white people are never terrorists.' These narratives likely influenced the image you conjure up in response to the opening question, 'When you hear the word 'terrorist,' who do you picture?'")

[265] Jason Burke, *The Myth of the 'Lone Wolf' Terrorist*, GUARDIAN (Mar. 30, 2017), https://www.theguardian.com/news/2017/mar/30/myth-lone-wolf-terrorist.

[266] *Id.*

[267] Corbin, *supra* note 261, at 456–57 ("Both false narratives--"all terrorists are Muslim" and "no whites are terrorists"--undermine rather than enhance our security. First, and most obviously, negative stereotypes jeopardize the security of Americans who are Muslim or are perceived as Muslim. Second, the mistaken belief that white people are not terrorists results in security blind spots that make the United States less safe.")

[268] Corbin, *supra* note 261, at 458–469 ("Time and again, attention is paid to the individual mental health of these white Christian extremists. 'With non-Muslims, the media bends over backwards to identify some psychological traits that may have pushed them over the edge. Whereas if it's a Muslim, the assumption is they must have done it because of their religion.' As a white terrorist, the main assumption made about my motive is that some personal trauma must have triggered my violence. In contrast, like a stock villain in a movie, the Muslim perpetrator has no backstory, no grieving family, his motive is clear enough.").

demonized and dehumanized in the media when a domestic terrorist attack occurs, however, the media covers white alt-right supporters as deeply troubled individuals with mental illness.[269] This false narrative not only harms individuals with mental illness, but it causes Americans and the government to create legislation to prevent the rise in violence that will not be effective in keeping Americans safe, as it is not the real issue.[270] The media needs to accurately portray the violence committed by the alt-right. Americans cannot protect themselves from the rising violence by the alt-right if it is misled about what is causing it, including the media's responsibility for projecting false stereotypes that further entice the alt-right's cause.

It is clear the alt-right uses multiple online platforms to influence and manipulate the mass media, spreading fear of fake news while being the ones primarily responsible for it.[271] The alt-right "are now able to bypass traditional gatekeepers and enter the conversation much easier in a globalized community on the Internet. We are starting to see politicians and news connect to users on social media platforms, thus removing journalistic gatekeepers from the equation."[272]

Not only is the mainstream media contributing to the spread of false information, but they also are not doing enough to address the growing issue of the alt-right. Too much spotlight is given to the alt-right views and messages, normalizing their hateful speech as political views, while at the same time, they are not being condemned on a large scale from the media.[273] While it is difficult to accurately judge how to address the alt-right in the media, as it is dangerous to overexpose and normalize them, and it is

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[269] Corbin, *supra* note 261, at 458–469.

[270] Corbin, *supra* note 261, at 458–469.

[271] MARWICK & LEWIS, *supra* note 2, at 51 ("Anglin used his site to direct a group of collaborating, networked readers to carry out a hoax he suspected the media would cover. The media, hungry for stories about racial tension on college campuses, took the bait and amplified what was essentially a non-story. Their coverage ironically made the incident newsworthy, justifying additional coverage from a range of national news sites.") ("In the months leading up to the 2016 U.S. election, a number of subcultural groups who organize online made a concerted effort to manipulate the existing media infrastructure to promote pro-Trump, populist messages. These messages spread through memes shared on blogs and Facebook, through Twitter bots, through YouTube channels, and even to the Twitter account of Trump himself— and were propagated by a far-right hyper-partisan press rooted in conspiracy theories and disinformation. They influenced the agenda of mainstream news sources like cable television, The Washington Post, and the New York Times, which covered Clinton conspiracy theories more than Trump's alleged sexual assaults and ties to Russia."); Summers, *supra* note 4.

[272] MARWICK & LEWIS, *supra* note 2, at 51.

[273] MARWICK & LEWIS, *supra* note 2, at 51.

imperative that the media addresses the true causes of increase in violence and condemn it.

As a nation, the media, on both sides of the political aisle, need to be more accountable to its actions, or lack thereof, in helping the alt-right grow. Conservative networks and news sources need to separate their identity from that of the alt-right and join in on addressing this severe threat to our country's security.[274] The conservative mainstream media site, the National Review, while acknowledged for condemning the alt-right, is criticized with taking too long to discuss the existence of the movement and not distancing itself enough.[275] In order to address this growing rate of the alt-right violence, and see the change in awareness to this issue, it is imperative that respectable conservative news sources, "frame the discussion as a problem the Republican Party needs to address."[276] Democrats and liberal media also need to be more responsible and work to limit the amount of coverage given to racist and bigoted alt-right ideas.[277] There is a large distrust of mainstream media in the US, with those on the right the least likely to trust mainstream media.[278] It would be more beneficial for mainstream media to engage in ethical journalism over reporting clickbait stories, especially in our current age of misinformation when truth is much more important.[279]

B. The Government

In 2017, a Congressman out-right proclaimed that "white violence is just different."[280] After the white supremacy march in Charlottesville, VA, where almost 250 white males carried torches shouting anti-Semitic

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[274] Summers, *supra* note 4, at 40.

[275] Summers, *supra* note 4, at 40.

[276] Summers, *supra* note 4, at 40.

[277] Summers, *supra* note 4, at 17-18. ("In Phillips's analysis, media outlets were guilty of further normalizing racist stereotypes and a white supremacist agenda. She ends her analysis with concern: 'But even those outlets and programs that avoided forwarding overtly racist content were guilty, at the very least, of providing bigots a national audience, and for further normalizing racist discourse and stereotypes' (p. 111). In her view, the mainstream media was at just as much fault for normalizing and spreading the agenda of white supremacists.").

[278] Summers, *supra* note 4, at 20-21. ("According to a September 2016 Gallup poll (2016), 32 percent of Americans say that they have a great deal 21 or fair amount of trust in the media, the lowest in the poll's history….Amazingly, only 14 percent of Republicans and rightwing respondents trusted the mainstream media.").

[279] Summers, *supra* note 4, at 20 quoting Yochai Benkler, Robert Faris, Hal Roberts, and Ethan Zuckerman (2017)("Traditional media needs to reorient, not by developing better viral content and clickbait to compete in the social media environment, but by recognizing that it is operating in a propaganda and disinformation-rich environment").

[280] Corbin, *supra* note 261, at 462.

statements and "white lives matter," and where many were injured including one female who was killed after being run over by an alt-right member, President Trump stated there were "very fine people on both sides."[281] This difference in treatment by the government and judicial system on the public response to white men committing violence is nothing new for America.[282]

When acts of terrorism do occur, both the government and media label the acts of violence committed by people of color as "terrorism", but rarely do not do so when the domestic terrorism is done by a white American male. The United States defines "domestic terrorism" as activities that

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[281] Don C. Smith, *Thinking About Neo-Nazis While Visiting a Death Camp—No 'Very Fine People'*, CHI. SUN TIMES (Aug. 13, 2018), https://chicago.suntimes.com/columnists/neo-nazis-wobblin-concentration-camp-charlottesville/.

[282] David Neiwert, *Trump's Fixation on Demonizing Islam Hides True Homegrown US Terror Threat*, REVEAL NEWS (Jun. 21, 2017), https://www.revealnews.org/article/home-is-where-the-hate-is/ ("While perpetrators of plots or attacks targeting on the broader public received three life sentences, seven death sentences and, among definite sentences, an average of 14.5 years in prison, no perpetrator of a plot or attack targeting a mosque or Muslims was ever sentenced to life or death, and they were sentenced, on average, to under nine years. Muslims, it seems, are taken quite seriously as potential perpetrators, but far less so as victims."); Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It.*, N.Y. TIMES (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html ("We're actually seeing all the same phenomena of what was happening with groups like ISIS, same tactics, but no one talks about it because it's far-right extremism,' says the national-security strategist P. W. Singer, a senior fellow at the New America think tank. During the first year of the Trump administration, Singer and a colleague met with a group of senior administration officials about building a counterterrorism strategy that encompassed a wider range of threats. 'They only wanted to talk about Muslim extremism,' he says. But even before the Trump administration, he says, 'we willingly turned the other way on white supremacy because there were real political costs to talking about white supremacy.'"); Michael German & Sara Robinson, *Wrong Priorities on Fighting Terrorism*, BRENNAN CTR. FOR JUST., (Oct. 31, 2018), https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%20%281%29.pdf ("[I]n the weeks before the deadly Charlottesville, Virginia, "Unite the Right" rally, the FBI's Domestic Terrorism Analysis Unit warned law enforcement that "Black Identity Extremists" posed a deadly threat, despite the fact that no such movement exists. The Justice Department hesitated to bring federal charges after a series of violent far-right riots around the country, in Sacramento, Anaheim, and Seattle before Charlottesville, left counter-protesters stabbed, beaten, and shot. By contrast, federal prosecutors aggressively pursued more than 200 felony conspiracy cases against activists and journalists who attended a January 20, 2017, anti-Trump protest, where some in the crowd broke store windows and set a limousine on fire. After two trials of the first dozen activists ended with acquittals and a judge ruled prosecutors illegally withheld evidence from defense attorneys, the Justice Department dropped the remaining cases.").

> "(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States."[283]

Dylann Roof, the convicted mass murderer that committed the Charleston church shooting, was not labeled as a terrorist, despite his own statements that his motivations were to start a race war in the U.S. Instead, he was charged with a hate crime. Labeling these acts as "terrorism" not only would help shift the social stereotypes projected by the media, but would also lead to harsher charges for the alt-right that commits these attacks and more resources being spent on stopping these acts of domestic terrorism by white supremacists. The difference in description matters.

Labeling alt-right attacks as terrorism would have a significant impact on the sentence these individuals would receive. A criminal defense attorney charged with a terrorism enhancement received a sentence that tripled from what the district court held prior to the terrorism enhancement being applied.[284] This is because "the Federal Sentencing Guidelines creates a terrorism enhancement that adds twelve levels to a defendant's offense level—and brings it up to at least level thirty two in any event—and raises the defendant's criminal history to the highest category. This means that the minimum guideline sentencing range for a federal defendant who receives the terrorism enhancement is 210–262 months."[285]

Furthermore, the label of "terrorism" perpetuates the idea that the act committed was done as part of a larger-scale "attack against all" instead of a "crime against some."[286] Hate crimes may often be seen as isolated and

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[283] 18 U.S.C. § 2331 (2018).

[284] Tung Yin, *Were Timothy Mcveigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33, 67 (2013) ("Lynne Stewart, who was convicted of providing material support to a foreign terrorist organization based on her interactions with her client, Omar Abdel-Rahman. Based on a number of factors, such as her age (70), her medical diagnosis of cancer, and her long career of zealous advocacy on behalf of largely poor and disfavored criminal defendants, the district judge initially sentenced her to twenty-eight months without clear explanation of whether it had applied the terrorism enhancement. The government successfully appealed this sentence, with the Second Circuit noting that the terrorism enhancement 'plainly applies as a matter of law.' On remand, the district court resentenced Stewart to a ten-year prison term. In short, in part because of the terrorism enhancement, Stewart's sentence more than tripled from what the district court had initially thought appropriate based on the same set of facts.").

[285] *Id.*

[286] Norris, *supra* note 13, at 263.

impulsive acts against a disapproved group, which removes it from the broader issues in society.[287] It allows Americans to think that the one attack does not put them at risk for danger, especially if they are not a part of the disliked group that was targeted. However, the term "terrorism" causes Americans to view the attack as part of a broader societal issue that could bring harm to themselves, creating an urgency and pressure on the government to take action.[288] When we label these acts of terrorism as hate crimes "someone might diminish its larger implication that surely this was an individual act."[289]

There is more than enough evidence to be able to label the mass violence committed by the alt-right as "terrorism", as many of the acts have been race motivated and intended to terrorize and assert white supremacy over the US.[290] The government needs to apply the same standard of labeling terrorists for what they are, regardless of their ethnicity and national origin, and Congress needs to create legislation that will address the terrorism committed by the alt-right, mainly by labeling it as "terrorism." Identifying the alt-right members that commit these acts of violence as terrorists could significantly help the safety of our country and other benefits "including more balanced media coverage, greater government accountability in the War on Terror, increased public vigilance against non-jihadi extremists, more attention to the country's history of racist terrorism, less support for Islamophobia and racism, and a more rational distribution of counterterrorism resources."[291] It would also indirectly affect internet companies, banks, and other organizations because

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[287] Norris, *supra* note 13, at 263.

[288] Norris, *supra* note 13, at 263.

[289] Norris, *supra* note 13, at 263.

[290] Corbin, *supra* note 261, at 471–72 ("There are plenty of other examples. The white Christian extremist who traveled to New York City to kill black men because "he was angered by black men mixing with white women" and he hoped murder would deter white women from relationships with black men. The white Christian in Kansas who mistook two Indian men for Middle Easterners and shot them after yelling "get out of my country." The white supremacist in Portland, Oregon, a supporter of a "White homeland," who killed two men on a train when they interrupted his anti-Muslim tirade against two teenage girls, one in a hijab. The white Christian who murdered six worshippers at a Sikh temple--a neo-Nazi skinhead and member of white supremacist heavy metal bands who "spoke of the need for securing a homeland for white people and referred to all non-whites as 'dirt people."' The white Christian who gunned down a black guard at the U.S. Holocaust Memorial Museum and was known to the Anti-Defamation League as "a longtime white supremacist anti-Semite" and Holocaust denier. The founder and former grand dragon of the Carolina Knights of the Ku Klux Klan who shot and killed three people on the eve of Passover near a Jewish community center and a Jewish retirement home and boasted, "[b]ecause of what I did, Jews feel less secure, "Nor are these examples exhaustive.").

[291] Norris, *supra* note 13, at 263.

any company "vital to any group's success would shy away from anything smacking of domestic terrorism. Nonviolent groups that share some of the radicals' agenda would also face pressure, and many would feel compelled to change."[292]

During the 2017–2018 session, two sister bills were introduced to Congress to address the violence committed by white extremists terrorism in the United States and its growing threat.[293] The Domestic Terrorism Prevention Act of 2018, states Congress finds that "[w]hite supremacists and other right-wing extremists are the most significant domestic terrorism threat facing the United States."[294] The bills emphasize the alarming and concerning rate at which these organizations, and the violence they commit, are growing and requests Congress take action to address this threat.[295] However, the bills failed to pass the Senate or House floor, and little is known about the action being taken. Despite the lack of support for these bills, Congress can bring more attention to the alt-right violence by creating a domestic terrorism team that would label these acts as terrorism and take action to prevent them.

Despite the United States having a federal definition of domestic terrorism, domestic terrorism is not an independent federal crime.[296] In order for the government to prevent domestic terrorism, the United States would need a separate "Domestic Terrorist Organization" list, similar to the "Foreign Terrorist Organizations," that allows for law enforcement, businesses, and ordinary citizens to know which groups are "illicit even if they agree with the cause as a whole." However, putting together a domestic list is difficult due to the line it crosses with First Amendment rights, "as many radical; activities such as encouraging hateful beliefs are protected free speech."[297]

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[292] Daniel L. Byman, *Should We Treat Domestic Terrorists The Way We Treat ISIS?: What Works—and What Doesn't*, BROOKINGS U. (Oct. 3, 2017) https://www.brookings.edu/articles/should-we-treat-domestic-terrorists-the-way-we-treat-isis-what-works-and-what-doesnt/.

[293] Domestic Terrorism Prevention Act of 2018, H.R. 4918, 115th Cong. § 2.1 (2018) (emphasis added); Domestic Terrorism Prevention Act of 2017, S. 2148, 115th Cong. (2017).

[294] Domestic Terrorism Prevention Act of 2018, H.R. 4918, 115th Cong. § 2.1 (2018).

[295] *Id.*

[296] Byman, *supra* note 292.

[297] Byman, *supra* note 292.

C. First Amendment Rights v. Public Safety

The US government and media have long protected targeted hate speech by entrenching it into an argument on first amendment rights.[298] The Supreme Court and lower courts have consistently protected race targeted fighting words, so long as they do not "incite violence" even if the speech used creates a feeling of threat of violence for the victim.[299] With the rise of technology and the anonymity of online speech, it is nearly impossible to say who's words directly led to violence, and therefore, very little protection (if any) is offered to minorities who are the target of this hate speech online and the violence caused by it. However, there needs to be restrictions put in place with the rising violence that is directly related to racist hate speech online.[300]

In Virginia v. Black, 538 U.S. 343 (2003), three KKK members were being charged for driving onto an African-American's lawn and spiking a burning cross on his lawn.[301] The Virginia statute, that they were charged under, made cross-burning illegal stating it is seen as a threat of violence or intimidation and that "[a]ny such burning ... shall be prima facie evidence of an intent to intimidate a person or group."[302] The Supreme Court held

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[298] Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1184 (6th Cir. 1995) (quoting R.A.V. v. St. Paul*,* 505 U.S. 377 (1992) (internal citations omitted) ("The Supreme Court held the First Amendment does not allow the imposition of 'special prohibitions on those speakers who express views on disfavored subjects.'").

[299] Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1184 (6th Cir. 1995) (quoting R.A.V. v. St. Paul, 505 U.S. 377 (1992)(internal citations omitted) ("The Court held: Although the [ordinance has been limited] to reach only those symbols or displays that amount to 'fighting words' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered…. *R.A.V.* also held the St. Paul ordinance constituted viewpoint discrimination because it prohibited fighting words used against persons because of their racial or ethnic affiliation but did not prohibit fighting words which could be hurled in response to a race or ethnic-based attack, even if the fighting words were the same.")).

[300] N. Douglas Wells, *Whose Community? Whose Rights?—Response to Professor Fiss*, 24 CAP. U. L. REV. 319 (1995) ("Hate speech should be subject to regulation because of the harm it visits upon the targets of the speech and because there is no other adequate redress for this harm. The harm caused by hate speech is greater than the psychological harm to the victims of hate speech; it also includes harm to society at large.").

[301] Virginia v. Black, 538 U.S. 343, 347–48 (2003).

[302] *Id.*

the statute unconstitutional and the three men had their charges dropped.[303] Justice Scalia held that cross burning is used for purposes other than to intimidate or threaten violence.[304] Justice Thomas wrote a brilliant dissent quoting Justice Holmes holding in New York Trust Co. v. Eisner: "a page of history is worth a volume of logic."[305] "Cross burning is valueless, like other threats and words that by their very utterance inflict injury; for the Court and the ACLU to find otherwise maintains a system of law that places White privilege above the security and dignity of minorities."[306] Justice White and legal scholars have heavily critiqued Justice Scalia's holding, stating "Justice Scalia turns the First Amendment on its head, transforming an act intended to silence through terror and intimidation into an invitation to join a public discussion."[307] Our society believes in this same false dichotomy: that free speech means tolerating propaganda and racially targeted hate speech. This false dichotomy is being constantly argued among scholars and officials, despite social media companies already censoring and placing restrictions on speech, specifically speech that threatens others, which the majority of Americans would agree is not a hindrance on free speech. Regulations can be put in place to address this rapid spread of hate speech, hate groups, and violence, without it being a burden on free speech.

The Supreme Court has placed limitations on speech as well. The Court has "on several occasions recognized that some public safety concerns warrant state regulations on threatening expressions, even when they pose no imminent threat of harm… states can prohibit speech that threatens public peace precisely because of its content."[308] This means,

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[303] *Id.*

[304] *Id.*

[305] *Id.* at 338–89.

[306] Kiran Sidhu, *The Supreme Court and the American Civil Liberties Union's Colorblind Protection of Cross Burning in First Amendment Jurisprudence Legitimates White Supremacy*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 337, 368 (2017).

[307] Charles R. Lawrence, III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 790 (1992) (Justice White's dissenting opinion captures the way in which the majority transforms an act of coercion and intimidation into high-value political speech. He observes that "the Court's new 'underbreadth' creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms .... Indeed, by characterizing fighting words as a form of 'debate,' . . . the majority legitimates hate speech as a form of public discussion." R.A.V., 505 U.S. at 402 (internal citations included).

[308] *See Black*, 538 U.S. at 363 ("[J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."); *See also* Alexander Tsesis, In*flammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1146 (2013).

there is already common law that allows Congress to address this growing issue, yet nothing is being done.

There is a need for regulation of speech, especially violent targeted hate speech. The Fourteenth Amendment requires full and equal citizenship, and allowing hate speech maintains caste systems and subordination that violates that core value.[309] Richard Delgado, a legal scholar and professor, stated, "[t]he psychological, sociological, and political repercussions of the racial insult demonstrate the need for judicial relief."[310] Another legal scholar stated that the "'discriminatory impact' of hate speech is 'a compelling governmental interest' in regulating it.[311] Furthermore, the hate speech regulation does not necessarily mean charging anyone that says something offensive with criminal charges, however this urgent need to limit hate speech and plots by extremist groups online can be met by placing responsibility on social media companies.

V. CONGRESS NEEDS TO PLACE RESPONSIBILITY ON SOCIAL MEDIA COMPANIES, INCLUDING A DUTY TO REGULATE AND STOP THE GROWTH OF HATE GROUPS. THESE LIMITATIONS WOULD PLACE NO ADDITIONAL BURDEN ON FIRST AMENDMENT RIGHTS

Internet platforms in America are currently protected from content liability due to Section 230 of the Communications Decency Act of 1996, which describes these firms as neutral providers on which users can communicate, rather than the publisher of its users' statements and actions. Section 230 reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[312] This approach made sense back when internet companies like Facebook had only 100 million users, but now Facebook has 2.2 billion monthly users, and sites like YouTube have 1.4 billion monthly logged-on users.[313] These internet platforms have now become the main venue for social interaction and discussion. Social-media platforms state they did not want to be the "arbiters of truth," "[y]et repeatedly in recent years [Facebook and YouTube], as well as Twitter, have been caught flat-footed by reports of abuse and manipulation of their

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[309] Wells, *supra* note 300, at 319–20.

[310] John T. Bennett, *The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation*, 43 HASTINGS CONST. L. Q. 445, 447 (2016).

[311] *Id.*

[312] 47 U.S.C. § 230.

[313] Menlo Park, *How Social-Media Platforms Dispense Justice*, ECONOMIST (Sep. 6, 2018), https://www.economist.com/business/2018/09/06/how-social-media-platforms-dispense-justice.

platforms by trolls, hate groups, conspiracy theorists, misinformation peddlers, election meddlers and propagandists" and are known for regulating speech on their platforms.[314] Online platforms no longer need protection from Congress, as they are among the world's most successful and influential firms, and have more than enough resources to be able to take on far more accountability. "Nearly half of American adults get some of their news on Facebook; YouTube, Google's video-streaming service, has 1.9 billion monthly logged-on users, who watch around one billion hours of video every day."[315]

We are slowly seeing lawmakers hold social media platforms accountable. For example, in 2018 Congress passed the FOSTA-SESTA act, which allows "state attorneys general and sex trafficking victims a clearer route to pursue legal action against websites hosting advertisements for prostitutes."[316] While this act was controversial, as many tech companies argued that it violated the Communications Decency Act, Congress found the need to end child trafficking to be of more importance. It should do the same with the growth of online hate groups and violence.

Congress should follow this new path and hold platforms accountable for their procedures: "clarify the criteria applied to restrict content; recruit advisory bodies and user representatives to help ensure that these criteria are applied; give users scope to appeal against decisions."[317] Furthermore, there needs to be more independent scrutiny of the companies algorithms to ensure these companies are not inaccurately discriminating against content, aside from material that causes harm.[318] Having access to the companies algorithms may also allow for lawmakers to evaluate how much advertising plays into the extreme language and messages being allowed to pass through

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[314] *Id.* ("In Myanmar, journalists and human-rights experts found that misinformation on Facebook was inciting violence against Muslim Rohyinga. In the aftermath of a mass shooting at a school in Parkland, Florida, searches about the shooting on YouTube surfaced conspiracy videos alleging it was a hoax involving 'crisis actors'. In reaction, Facebook and YouTube have sharply increased the resources, both human and technological, dedicated to policing their platforms. By the end of this year Facebook will have doubled the number of employees and contractors dedicated to the 'safety and security' of the site, to 20,000, including 10,000 content reviewers. YouTube will have 10,000 people working on content moderation in some form. They take down millions of posts every month from each platform, guided by thick instruction manuals—the guidelines for 'search quality' evaluators at Google, for example, run to 164 pages.").

[315] *Should the Tech Giants Be Liable For Content*, ECONOMIST (Sep. 8, 2018), https://www.economist.com/leaders/2018/09/08/should-the-tech-giants-be-liable-for-content?fsrc=scn/tw/te/bl/ed/shouldthetechgiantsbeliableforcontenttruthandpower.

[316] Park, *supra* note 313.

[317] *Should the Tech Giants Be Liable For Content*, *supra* note 315.

[318] *Should the Tech Giants Be Liable For Content*, *supra* note 315.

their site, and allow for legislation to be put in place that would regulate rules about online advertising on these platforms.[319]

Fears of free speech violations are not a plausible argument when these social media companies are already engaging content regulation and restriction of speech.[320] Section 230 of the Communications Decency Act of 1996 should be amended to state that platforms have a reasonable duty to regulate hate speech, and can be found to be liable if it is grossly ignoring hate speech and the growth of extremist groups on their platforms. This would not change any part of the regulation that these sites already have on speech, but would rather enforce consequences giving these multi-billion dollar corporations incentive to do a better job of regulating hate groups and targeted attacks against others. It would also make smaller start-up companies take their platform seriously and address this issue at the beginning of their start-up making it easier for them to address the issue as their platform grows.

As of now, these companies are doing very little to address these concerns as one study found that "[n]ine of the top 10 fake news sites during the month before the election were still in or near the top 10 six months later."[321] The social media giant, Twitter, claims to be working on making

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[319] Park, *supra* note 313 ("More profound change is also possible. If misinformation, hate speech and offensive content are so pervasive, critics say, it is because of the firms' business model: advertising. To sell more and more ads, Facebook's algorithms, for instance, have favoured "engaging" content, which can often be the bad kind. YouTube keeps users on its site by offering them ever more interesting videos, which can also be ever more extreme ones. In other words, to really solve the challenge of content moderation, the big social-media platforms may have to say goodbye to the business model which made them so successful.").

[320] Zack Beauchamp, *Facebook Blocked The Spread of A Liberal Article Because A Conservative Told it To*, VOX (Sep. 12, 2018), https://www.vox.com/policy-and-politics/2018/9/12/17848026/facebook-thinkprogress-weekly-standard ("Facebook's fact-checking unit is outsourced to the Weekly Standard's Fact-Checker and his four nonpartisan peer outlets. I say "his" because the Weekly Standard's Fact Checker is not a division of the publication but rather one man — Holmes Lybrand, a conservative journalist who graduated college in 2016. Sometimes Facebook flags articles to be reviewed by its partner fact-checkers. Sometimes the fact-checkers bring an article to Facebook, telling them it's false. The fact-checkers write an article explaining their ruling, and then Facebook punishes an article if it's false. According to Facebook product manager Tessa Lyons, a publication that repeatedly publishes articles determined to be "false" will be punished more severely: Facebook will "cut off their ability to make money or advertise on our services." Facebook told Millhiser that partner outlets have nearly unchecked power to block traffic to an article deemed false. "A Facebook employee responded by email that Facebook defers to each independent fact-checker's process and publishers are responsible for reaching out to the fact-checkers directly to request a correction," Millhiser explains. The purpose of this process is, explicitly, fighting back against fake news spread for political purposes (like, say, swinging the 2016 election)).

[321] MATT HINDMAN & VLAD BARARSH, DISINFORMATION, 'FAKE NEWS' AND

changes, and yet "83% of the mapped accounts that spread fake and conspiracy news during the 2016 election are still active today, November 20, 2018."[322] With the spread of fake news and hate groups on these online platforms, it is clear that legislation needs to be put in place to force companies to do a better job of gatekeeping.

CONCLUSION

For too long white supremacists have been able to commit acts of domestic terrorism against the U.S. with little repercussion. White supremacists are the number one domestic terrorist threat in the U.S., and yet the government has done little to stop it. In fact, domestic terrorism is not an independent federal crime in the U.S., and rarely, if any, white supremacists are charged with an international terrorism charge. Therefore, everyday citizens are led to believe what the media and government say is the cause of the violence: mental illness. When a white supremacist commits acts of domestic terrorism, our government and media blame mental illness. This is despite the fact that a mentally ill individual is less likely to commit gun violence, and they continue to grossly ignore the real cause of the violence: radicalization and encouragement of violence from white supremacy groups.

Social media is allowing these hateful organizations to recruit, grow, and become visible leading to more hate crimes, murders, threats, and acts of terrorism. Yet the U.S. government protects these social media companies through the Communications of Decency Act of 1996, all the

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INFLUENCE CAMPAIGNS ON TWITTER, 3 (Knight Foundation, 2018).

[322] HOW MUCH 'FAKE NEWS' CAN WE IDENTIFY ON TWITTER, (Knight Foundation, 2018), https://www.knightfoundation.org/features/misinfo; MATT HINDMAN & VLAD BARARSH, DISINFORMATION, 'FAKE NEWS' AND INFLUENCE CAMPAIGNS ON TWITTER, 3 (Knight Foundation, 2018) ("Much fake news and disinformation is still being spread on Twitter. Consistent with other research, we find more than 6.6 million tweets linking to fake and conspiracy news publishers in the month before the 2016 election. Yet disinformation continues to be a substantial problem postelection, with 4.0 million tweets linking to fake and conspiracy news publishers found in a 30-day period from mid-March to mid-April 2017. Contrary to claims that fake news is a game of "whack-a-mole," more than 80 percent of the disinformation accounts in our election maps are still active as this report goes to press. These accounts continue to publish more than a million tweets in a typical day. Just a few fake and conspiracy outlets dominated during the election—and nearly all of them continue to dominate today. Sixty-five percent of fake and conspiracy news links during the election period went to just the 10 largest sites, a statistic unchanged six months later. The top 50 fake news sites received 89 percent of links during the election and (coincidentally) 89 percent in the 30-day period five months later. Critically—and contrary to some previous reports—these top fake and conspiracy news outlets on Twitter are largely stable. Nine of the top 10 fake news sites during the month before the election were still in or near the top 10 six months later.").

while the courts are placing first amendment rights before the feelings of safety of others, to which these media companies then use to hide behind as their excuse for inaction. Despite this rhetoric, there is action from media companies against freedom of speech. These companies are constantly moderating content and restricting free speech, because they are allowed too. However, there are no regulations or controls on how these companies regulate their content. Instead, they are grossly mismanaging their platforms, allowing for political elections to be influenced through the spread of propaganda on their platform, hate-speech to run rampant, and extremist groups to manipulate mass media and recruit members to commit acts of violence.

It is time to start taking hate speech seriously and stop hiding behind the First Amendment at the cost of safety of others. The violence is real. The lives lost are real. Regardless of the political climate, who our President is, we as a nation need to protect our citizens. It is time to stop blaming the rise in violence on mental illness, and to recognize the reality and threat of the increasing recruitment and violence committed by the alt-right. We need to join together as a nation to address all of these areas in which our citizens, primarily young adults, are being radicalized to commit violence against his/her own country in the name of white supremacy.

APPENDIX ONE[323]

Table 3. Potential Risk Factors for Individuals Radicalizing to Violent Extremism

	Risk Factor	May Result in an Individual
Individual Factors	Experiencing identity conflict	Being drawn to a strong group identity that can resolve this conflict.
	Feeling there is a lack of meaning in life	Being attracted to a belief system that purports to have all of the answers.
	Wanting status	Being drawn to opportunities to prove oneself to be heroic, brave and strong.
	Wanting to belong	Being drawn to joining a tight-knit group.
	Desiring action or adventure	Being drawn to participating in dangerous, illegal and/or violent activity.
	Having experienced trauma*	Being vulnerable to those who promise recompense or revenge.
	Having mental health issues or being emotionally unstable/troubled	Being vulnerable to others' influence.
	Being naïve or having little knowledge of religion and ideology	Being open to fringe religious and ideological interpretations.
	Having strong religious beliefs	Being drawn to those who claim to be guided by religion.
	Having grievances	Being drawn to those who promise to address these grievances.
	Feeling under threat	Being open to engaging in activities that purport to remove this threat.
	Having an "us versus them" world view	Being ready to view those outside one's group as enemies.
	Justifying violence or illegal activity as a solution to problems*	Being open to joining with those who engage in violence and illegal activity.
	Having engaged in previous criminal activity*	Being open to joining with those who engage in illegal activity and justify it as part of a greater mission.
Contextual Factors	Stressors (e.g., a family crisis, being fired from a job)	Being drawn to explanations that blame others for one's situation.
	Societal discrimination or injustice	Being drawn to those who promise recompense or revenge against those who discriminate or oppress.
	Exposure to violent extremist groups or individuals	Viewing violent extremists as less extreme.
	Exposure to violent extremist belief systems or narratives	Viewing violent extremist belief systems and narratives as less extreme.
	Family members or others in violent extremist network*	Identifying with violent extremists and viewing them as less extreme.

*Risk factor was identified by comparing individuals who did and did not engage in extremist violence.

[323] NATIONAL INSTITUTE OF JUSTICE, RADICALIZATION AND VIOLENT EXTREMISM: LESSONS LEARNED FROM CANADA, THE U.K. AND THE U.S. 8 (U.S. Department of Justice, 2015).

APPENDIX TWO[324]

Table 4. Potential Protective Factors Against Individuals Radicalizing to Violent Extremism

	Protective Factor	May Result in an Individual
Individual Factors	Having self-esteem	Being confident in one's own views and less likely to be easily influenced by others.
	Having strong ties in the community*	Feeling one is a member of a community and has someplace to turn when facing difficulties.
	Having a nuanced understanding of religion and ideology	Being less accepting of religious or ideological interpretations that are simplistic or dogmatic.
Contextual Factors	Parental involvement in an individual's life	Feeling one's family is present, cares and is ready to help in times of difficulty.
	Exposure to nonviolent belief systems and narratives	Being able to identify a range of alternatives to violent belief systems and narratives.
	A diversity of nonviolent outlets for addressing grievances	Feeling one's grievances are acknowledged and respected as well as believing in the possibility of their being resolved in a lawful manner.
	Societal inclusion and integration	Feeling one's group is a valued member of society and is treated fairly.
	Resources to address trauma and mental health issues	Feeling that help is available when facing cognitive and emotional difficulties.

*Protective factor was identified by comparing individuals who did and did not endorse extremist violence.

[324] *Id.* at 9.

THE ROOT OF THE PROBLEM: ENFORCING THE VOTING RIGHTS ACT IN MODERN SETTINGS

By Paul Davis*

After the decision in Shelby County v. Holder, the Voting Rights Act lost its primary means of enforcement. The only comparable tool for regulating against election discrimination is now Section 3(c) of the Act. While election discrimination claims made under this provision are difficult to prove, scholars have offered promising approaches for reintroducing this remedy where needed.

However, legislators in recent cases have tried to preserve past discriminatory laws. To prevent backslide, voters need new methods to enforce voting rights. As the historical purpose of the Voting Rights Act was to overcome obstructions to election reform, adaptation is critical for the Act's proper enforcement. This note adds to existing literature by focusing on how Section 3 preclearance could be applied to the subset of discrimination challenges which involve election reform obstruction.

INTRODUCTION

In 2017, a Fifth Circuit judge ordered the city of Pasadena, Texas be placed under federal preclearance, subjecting all of the city's future election decisions to federal approval before changes could take effect.[1] The court found Pasadena intentionally discriminated against Latino voters when Pasadena reduced their influence through redistricting, thereby violating the Voting Rights Act (VRA).[2] Pasadena was the first jurisdiction to be placed back under federal oversight since *Shelby County v. Holder*.[3] In *Shelby*, the U.S. Supreme Court struck down the VRA's "coverage formula"—a

* J.D. Candidate 2020, Sandra Day O'Connor College of Law at Arizona State University. Special thanks to Professor Joshua Sellers for his guidance in the writing process and expertise in election law.

[1] Patino v. City of Pasadena, 230 F. Supp. 3d 667, 674 (S.D. Tex. 2017).

[2] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.) (The Voting Rights Act will be referenced frequently throughout this article. Section 2 of the Voting Rights Act prohibits a municipality from denying or abridging the voting rights of individuals on the basis of race or color. A violation may be established by a showing that election processes are not equally open to a protected minority as they are to white voters.).

[3] Manny Fernandez, *In Texas, a Test of Whether the Voting Rights Act Still Has Teeth*, N.Y. TIMES (Jan. 15, 2017), https://www.nytimes.com/2017/01/15/us/in-texas-a-test-of-whether-the-voting-rights-act-still-has-teeth.html.

provision designating which states' election laws were subject to federal preclearance.[4] The *Shelby* decision lifted that burden overnight, and many states' officials wasted no time pushing restrictive and discriminatory policies that would have been otherwise barred by federal regulation. When SCOTUSBlog asked then-Mayor Johnny Isbell about the reason for Pasadena's sudden redistricting change, he replied, "because the Justice Department can no longer tell us what to do."[5]

Less than a year later, the Justice Department resumed telling Pasadena what to do.[6] This was a rare victory for voting rights advocates, as states had been mostly successful in their efforts to take advantage of *Shelby* by pushing election restrictions.[7] Pasadena was one of only two jurisdictions whose post-*Shelby* actions had put them back under federal preclearance.[8] Pasadena was subject to preclearance through Section 3(c) of the VRA, the sole remaining route to this remedy.

Section 3(c) of the VRA allowed a jurisdiction to be "bailed-in" or placed back under federal supervision if the jurisdiction intentionally violated voters' Fourteenth or Fifteenth Amendment rights. While this rarely-used provision had not received much attention (the coverage formula made it mostly unnecessary), it took on new prominence after the formula was struck down in *Shelby*. As legislative restoration of the VRA formula was politically unrealistic, scholars and voting rights advocates began favoring the judicial solution offered by Section 3.

To be sure, advocates noted the lack of guidance for analysis under Section 3 due to Section 3's infrequent use. Legal academics have offered judicial standards and frameworks that could potentially guide analysis for Section 3 claims.[9] While these approaches have shown promise in the limited number of Section 3 claims litigated thus far, cases usually feature a single discriminatory policy authored by one discrete actor. For such cases, the analysis underlying the intentional discrimination claim is fairly straightforward.

Recently, two 2018 Texas voting rights cases introduced new complications. These cases, *Abbott v. Perez* and *Veasey v. Abbott*, featured

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[4] Shelby County v. Holder, 570 U.S. 529, 557 (2013).

[5] Fernandez, *supra* note 3.

[6] Fernandez, *supra* note 3.

[7] Fernandez, *supra* note 3.

[8] Allen v. City of Evergreen, No. 13-107-CG-M, 2013 WL 1163886, at *1 (S.D. Ala. Mar. 20, 2013).

[9] Edward K. Olds, *More than "Rarely Used": A Post*-Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185, 2194 (2017); Roseann R. Romano, *Devising a Standard for Section 3: Post*-Shelby County *Voting Rights Litigation*, 100 IOWA L. REV. 387, 404–05 (2014); Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2033 (2010).

a redistricting plan and a voter ID law, respectively. While the claims involved different election policies, both followed a similar narrative: the court found the original election policy to be discriminatory and ordered the state legislature to provide a legislative remedy.[10] Further, in both cases the court found the legislature intentionally designed the subsequent "remedy" to preserve the discriminatory effects of the offending policy. In light of this obstruction, both courts determined the legislature had once more engaged in intentional discrimination.[11]

Both decisions were subsequently reversed. In each reversal, appellants alleged the lower court improperly shifted the burden to the legislature in proving the remedy was not unconstitutional. However, both records suggest the lower courts had not engaged in such burden-shifting, but instead reached their respective conclusions by weighing all available evidence. This evidence included recent discrimination attempts, which would be relevant for the consideration of preclearance. However, both higher courts interpreted the influence of this factor as legal error.[12] These differing conclusions show a considerable distance between the lower and higher courts' understandings of the record. Such a divided approach to legislative "remedies" indicates courts and litigants need judicial clarity on this topic.

This note supports arguments that favor Section 3(c) preclearance as the best solution for addressing election discrimination. It then proposes a judicial framework for applying preclearance to jurisdictions that engage in legislative obstruction to court-ordered remedies (hereafter, "remedy cases"). Part I explains the history and structure of the Voting Rights Act, Part II discusses the judicial solution presented by Section 3(c) of the Voting Rights Act, Part III reviews and critiques past literature on Section 3 preclearance in the post-*Shelby* era, and Part IV describes the proposed judicial framework for investigating potential obstruction to election reforms.

I. THE VOTING RIGHTS ACT

A. Origin of the Voting Rights Act

The Voting Rights Act of 1965 was designed to prevent state and local governments from passing laws that would suppress the votes of racial

[10] Abbott v. Perez, 138 S. Ct. 2305, 2313 (2018); Veasey v. Abbott, 888 F.3d 792, 796 (5th Cir. 2018).

[11] Abbott v. Perez, 138 S. Ct at 2313; Veasey v. Abbott, 888 F.3d at 798 (As part of its decision, the *Perez* Court had ordered a hearing to consider whether Texas should be "bailed-in" under Section 3(c) of the VRA as a result of the intentional discrimination finding.).

[12] Abbott v. Perez, 138 S. Ct at 2325; Veasey v. Abbott, 888 F.3d at 802.

minorities. The VRA was enacted against the backdrop of the post-Reconstruction era—a century of concerted efforts by Southern states to block enforcement of the Fourteenth and Fifteenth Amendments. Campaigns to obstruct African American enfranchisement were relentless and sophisticated, as Southern legislators and officials exploited every conceivable loophole to frustrate civil rights reforms. Racism in the United States had proven to be a persistent disease, afflicting voting institutions for a century after suffrage was supposedly guaranteed by the Fifteenth Amendment.

In response, Congress administered "strong medicine" by enacting the VRA in 1965.[13] Congress intended to permanently end election discrimination with these comprehensive civil rights. Under the VRA's preclearance regime, offending states could no longer adapt or replace their laws to circumvent federal regulations. Preclearance stopped these efforts before they began. The success of this approach for minority enfranchisement soon became evident. While Mississippi had a long record of obstructing election reform through various strategies prior to 1965, African-American voter registration rates increased from 6.7 percent in 1965 to 59.8 percent in 1967.[14] This upward shift was largely credited to the VRA.[15]

B. Structure of the VRA

Section 2 of the VRA prohibits any state or political subdivision in the nation from imposing any "qualification or prerequisite" that would deny or abridge an individual's voting rights on the basis of race or color.[16] It restricts procedures designed to be intentionally discriminatory as well as those that have a discriminatory impact.[17] Section 2 provides for an individual cause of action related to these violations, which can be brought by the Attorney General or the affected individual(s).

Sections 4 and 5 of the VRA govern its "preclearance" function through interrelated effects. Combined, Sections 4 and 5 allow the federal

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[13] Shelby County v. Holder, 570 U.S. 529, 535 (2013).

[14] U.S. COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION—VOLUME VII: THE MISSISSIPPI DELTA REPORT (2001), https://www.usccr.gov/pubs/msdelta/ch3.htm (Mississippi had historically imposed numerous statutory and constitutional restrictions for the purpose of preventing African American voter registration, along with a record of "extensive and brutal voter intimidation and violence.").

[15] *Id.*

[16] Voting Rights Act of 1965, 52 U.S.C.A. § 10301 (1982).

[17] *Id*. (This change was added in the 1982 VRA amendments. S. REP. NO. 97–417, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 179.).

government to intervene in the elections of jurisdictions which are known to have engaged in race-based voter suppression. Section 5 requires certain jurisdictions to preapprove any new voting-related law, standard or procedure with the Department of Justice (DOJ) or the District Court for the District of Columbia. Before a covered state could enact its new policy, either the DOJ or the D.C. District Court had to confirm the policy would not abridge or deny the right to vote on the basis of race or color. Section 4(b) provided the "coverage formula" for identifying jurisdictions subject to Section 5 requirements. Section 4(a) provided for a "bail-out procedure," in which a covered jurisdiction which meets certain requirements could be released from preclearance.

Section 3 of the VRA also relates to preclearance, although the remedy is applied on a smaller scale. Known as the "bail-in" provision, this device applies federal preclearance to discrete pockets of discrimination, such as political subdivisions, rather than entire states. It allows courts to restrict voting laws for entities engaging in election discrimination which are not covered under 4(b). When a court finds a jurisdiction has violated the 14th or 15th Amendment, Section 3 allows the court to retain jurisdiction "for such period as it may deem appropriate."[18] During said period, the court may require preclearance of any voting-related measures proposed by the jurisdiction.

Section 3 preclearance differs from Section 5 in several key respects. Section 3 requires recent discriminatory intent as per the requirements for claims brought under the 14th and 15th Amendments. Section 3 is flexible in terms of coverage time, and it can be targeted to restrict only certain types of voting measures.[19] Use of Section 3 has been largely overshadowed by Section 5, however, which is favored for its statewide application.[20]

C. The Fall of the VRA: *Shelby County* and its Aftermath

In 2013, the U.S. Supreme Court issued its decision in *Shelby County v. Holder*, holding Section 4(b) of the VRA unconstitutional.[21] The Court explained the coverage formula's differential treatment of the states violated equal sovereignty principles.[22] The federal intrusion asserted by this law was "strong medicine," justified at one point in history by pervasive

[18] Voting Rights Act of 1965, 52 U.S.C.A. § 10302 (2006).

[19] Edward K. Olds, *More than "Rarely Used": A Post*-Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185, 2194 (2017).

[20] *Id.*at 2186–87.

[21] Shelby County v. Holder, 570 U.S. 529, 557 (2013).

[22] *Id.* at 535.

and entrenched discrimination.[23] However, the coverage formula had not been updated in recent years, even though Congress had opportunities to do so.[24] The Court stated the formula was no longer tethered to the contemporary scope of discrimination issues upon the record before it.[25]

In light of the disconnect, the Court reasoned the formula's impositions on state sovereignty could no longer be justified as there was no longer evidence of sustained discrimination.[26] However, not all justices endorsed this logic. As Justice Ginsburg argued in her dissent, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[27] Notably, while the majority stated Section 4(b)'s preclearance formula was no longer constitutionally justified, the holding spared the preclearance function itself.[28] Still while *Shelby* left Section 5 intact, this remedy no longer had its trigger.

The *Shelby* decision stripped the VRA of its means of enforcement. While Section 2 remained, the lack of an ex-ante device for addressing election discrimination meant (1) affected individuals faced a lengthy and expensive road to relief if they even succeeded, and (2) a discriminatory statute could not be addressed before voters felt its consequences. While Section 3 remained as a route for establishing preclearance, it still involved litigation and had not been traditionally used. Meanwhile, states were now free to pursue restrictive election laws that had been held back by the VRA.

Despite the *Shelby* Court's proclamation that the country had emerged from its troubled civil rights record, events following the striking of 4(b) cast doubt on this assessment.[29] After *Shelby*, a series of lawsuits and legal challenges in former preclearance-states ensued.[30] Mere hours after the ruling, Texas officials announced they would begin enforcing SB 14, the most restrictive voter ID law in the nation, which threatened to largely disenfranchise African American and Hispanic communities.[31] Elsewhere in the state, the mayor of Pasadena swiftly moved to eliminate

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[23] *Id.*

[24] *Id.* at 557.

[25] *Id.* at 536, 557.

[26] *Id.*

[27] *Id.* at 590 (Ginsburg, J., dissenting).

[28] *Id.* at 557 (majority opinion) ("We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.").

[29] *Id.* at 551.

[30] Matt Ford, *The Entirely Preventable Battles Raging over Voting Rights*, THE ATLANTIC (Apr. 14, 2017), https://www.theatlantic.com/politics/archive/2017/04/shelby-county-v-holder-voting-rights-supreme-court/522867/.

[31] Matt Ford, *A Victory for Voting Rights in Texas*, THE ATLANTIC (July 20, 2016), https://www.theatlantic.com/news/archive/2016/07/texas-voter-id-ruling/492272/.

the city's system of eight single-member districts.[32] The replacement plan provided that two council seats would be elected at-large, greatly reducing the voting power of Latinos in the region. A federal judge later confirmed the plan was intentionally designed to reverse the recent electoral successes of Latino voters.[33]

Meanwhile, in Alabama, thirty-one Department of Motor Vehicles offices were shuttered.[34] All closed facilities were specifically located near predominantly African American communities, depriving these communities of the ability to obtain the photo IDs necessary for voting.[35] Later investigations revealed Alabama Governor Bentley's insistence to state law enforcement that the plan have "limited impact on [the Governor's] political allies."[36] In North Carolina, the state legislature passed a comprehensive set of voting restrictions that included voter ID requirements, reduced early voting opportunities, and severely constrained various voter registration options.[37] As the Fourth Circuit ultimately found, these measures targeted African American communities "with almost surgical precision."[38]

In 2018, a bipartisan federal commission reviewed these post-*Shelby* developments in sum, determining restrictive election legislation had "surged" in the wake of the *Shelby* decision.[39] The commission reported at least twenty-three states had enacted "newly restrictive statewide voter laws" since the decision.[40] These laws included efforts such as closing polling places, reducing early voting, aggressively purging voter rolls, and enacting strict voter ID laws.[41]

In light of these events, Ginsburg's warning against "throwing away your umbrella" in her *Shelby* dissent has proven well-founded.[42] The timing, scope and aggressiveness of post-*Shelby* voting restrictions show

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[32] Gabrielle Banks, *Pasadena Deliberately Diluted Hispanic Vote, Judge Rules in Voting Rights Case*, HOUS. CHRON. (Jan. 6, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Pasadena-deliberately-diluted-Hispanic-vote-10841460.php.

[33] *Id*.

[34] Ford, *supra* note 30.

[35] Ford, *supra* note 30.

[36] Ford, *supra* note 30.

[37] N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 216–18 (4th Cir. 2016).

[38] *Id.* at 214.

[39] Eric Bradner, *Discriminatory Voter Laws Have Surged in Last 5 Years, Federal Commission Finds*, CNN POL. (Sept. 12, 2018, 3:17 PM), https://www.cnn.com/2018/09/12/politics/voting-rights-federal-commission-election/index.html.

[40] *Id.*

[41] *Id.*

[42] Shelby County v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

that without the deterrent of preclearance, voter disenfranchisement efforts have resumed in force. Further, the remaining VRA Section 2 cannot hold back the storm, as it relies on individual actions and has no ex-ante effect. To counter the efforts to restrict voting, individual challengers would have to litigate each new discriminatory statute. Such expense would prove burdensome as plaintiffs now face an unrelenting wave of well-resourced attempts to restrict elections.[43] As such, the remedy for combatting these policies must involve preclearance.

II. JUDICIAL SOLUTIONS: SECTION 3 AND THE "BAIL-IN" PROCEDURE

While *Shelby* indicated openness to legislative restoration of preclearance, such a route is unrealistic. Aside from difficulties in Congress, the current administration has shown itself to be unwilling to pursue election discrimination matters. As the 2018 commission pointed out, no Section 2 lawsuits have been filed by the current administration despite recent events in states formerly under preclearance.[44]

Under current conditions, the judicial remedy presented by Section 3's bail-in procedure stands as the best method for re-establishing preclearance. While this method does not offer the comprehensive remedy of a VRA bill, it is far more likely to succeed in this political climate. Further, Section 3 does not present the constitutional infirmities of the formula provision. The *Shelby* Court opposed the incursion of federal influence in state elections on the basis of a formula derived from general, decades-old information. The trigger for Section 3 preclearance, however, is based on a jurisdiction's recent misconduct, which allows the remedy to sidestep the constitutional problems at issue in *Shelby*.

One notable issue with Section 3, however, is its high evidentiary burden. In order for Section 3's preclearance remedy to take effect, plaintiffs would have to prove the offending jurisdiction violated the 14th or 15th Amendment which requires plaintiffs to establish discriminatory intent. As modern tactics for official discrimination have grown more nuanced and sophisticated, it is less likely state officials would clearly state their intentions or otherwise reveal a "smoking gun" in the way required by this burden of proof. Only in profoundly rare cases have state officials provided such overt admissions.[45]

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[43] Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2033 (2010).

[44] *See* Bradner, *supra* note 39.

[45] N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) ("Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for a challenged statute hinges explicitly on race—specifically its concern African Americans, who had overwhelmingly voted for Democrats, had too

III. LITERATURE ON SECTION 3'S APPLICATION

A. "*Arlington*-style" Analysis

Legal scholars favor Section 3 preclearance as a potential means of regulating election discrimination. Noting the high evidentiary burden for these claims, scholars offer various standards/frameworks a court could use to examine an election law for intentional discrimination. These proposed frameworks are often expansive, requiring evidence of misconduct from a wide range of sources while not going so far as to require an outright admission or "smoking gun." This structure reserves Section 3 remedies for the likeliest cases of intentional discrimination while making it possible to prevail on such claims. These solutions trace a path to preclearance which is more feasible for plaintiffs in the modern era.

Scholars have discussed changing the legal standard for Section 3 claims to "invidious discrimination," which would allow courts to consider laws' minority-targeted effects and resemblance to past discriminatory devices.[46] Scholars also propose courts test specific indicia such as a jurisdiction's history of discrimination, how recent and/or severe the relevant voting restrictions are, specific political developments in a jurisdiction, the burdens imposed on individuals bringing Section 2 lawsuits, etc.[47] Indicia are chosen to collectively suggest the likelihood of a jurisdiction committing future discrimination.

Generally, scholars' proposed frameworks for Section 3 claims seek to employ a wide range of social/political indicators for identifying intentional discrimination. This approach resembles the *Arlington Heights* analysis used by the Fourth Circuit in *North Carolina State Conference of the NAACP v. McCrory*.[48] As noted previously, the *McCrory* court found North Carolina's omnibus voting restriction bill to be intentionally discriminatory, striking the law down in 2016.[49] The court reached this finding via the totality-of-the-circumstances analysis relied upon in an earlier discrimination case, which included evidence such as the jurisdiction's past history of discrimination, racially polarized voting, the

much access to the franchise.").

[46] Roseann R. Romano, *Devising a Standard for Section 3: Post*-Shelby County *Voting Rights Litigation*, 100 IOWA L. REV. 387, 404–05 (2014).

[47] *See* Olds, *supra* note 19.

[48] *McCrory*, 831 F.3d 204; *see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977) (providing a list of factors which may be evidence of discriminatory intent).

[49] *McCrory*, 831 F.3d at 238, 242.

sequence of events leading up to the legislative decision, and other related circumstances.[50]

Scholars' adoption of the "*Arlington*-style" approach is further supported by commentary following *McCrory's* result. While the *McCrory* court had met the evidentiary requirements of a Section 3 claim under the *Arlington* approach, the court ultimately declined to re-impose preclearance in a few brief lines.[51] Academics criticized this choice as a wasted opportunity to articulate a clear standard for Section 3 preclearance.[52] These critics suggested the *Arlington* analysis is ideal for imposing preclearance and should be used in the future. As such, recent literature on Section 3 has identified the totality-of-the-circumstances *Arlington*-style approach as the most promising analytical model.

B. The problem with *Arlington*

As shown in *McCrory* and noted by critics, the totality-of-the-circumstances approach can be effective for establishing intentional discrimination. However, the usefulness of this approach largely depends on *when* the discriminatory election law was passed and what conduct occurred afterward. For example, a straightforward *Arlington* analysis is useful where a legislature has recently passed a facially neutral election law which is likely based on discriminatory intent. In such a context, there is only one law passed by one state body. Both the actor and the discriminatory act occupy the same event, and this event can be considered in light of the circumstances.

However, the right approach becomes murkier if the offending law was passed in years prior and the legislature has now taken measures to

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[50] *Id.* at 220.

[51] *Id.* at 241 (The *McCrory* Court's preclearance-related discussion consisted only of one passage at the end of the opinion: "As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements. Such remedies "[are] rarely used" and are not necessary here in light of our injunction.").

[52] *See* Olds, *supra* note 19*; Election Law—Voting Rights Act—Fourth Circuit Strikes Down Provisions of Election Law Enacted with Racially Discriminatory Intent.*—North Carolina State Conference of the NAACP v. McCrory, *831 F.3d 204 (4th Cir. 2016),* 130 HARV. L. REV. 1752 (2017); Lyle Denniston, *Constitution Check: Is Section 3 of the Voting Rights Act a Dead Letter?*, CONST. CENTER (Aug. 9, 2016), https://constitutioncenter.org/blog/constitution-check-is-section-3-of-the-voting-rights-act-a-dead-letter/ (Critics discussed how the *McCrory* Court could have addressed the lack of judicial guidance concerning Section 3 litigation but failed to give the remedy any meaningful analysis. Commentators also noted how the *McCrory* Court had inappropriately relied on a pre-*Shelby* case for its "rarely-used" justification.).

preserve its effects. For example, a court may order a state legislature to amend a discriminatory election law, only for the subsequent state body to ignore or otherwise subvert those orders. This scenario confounds a straightforward *Arlington* analysis because it involves different (although often closely associated) actors who have committed different wrongs.

As demonstrated in recent cases, the straightforward *Arlington*-style approach is not useful for assessing the legislature's avoidance (or obstruction) of the remedy because the more recent violation is one of omission—the defendant has done nothing, and that is the point.[53] Thus, the legislature that subverted the court order cannot be held easily accountable for its discriminatory intent because it was not technically the "source" of the original law's discriminatory elements, despite taking measures to defend those elements. This is a significant problem for election reform, as it prevents courts from correcting discriminatory wrongs that have held over from the past.

IV. PROPOSAL: THE CONTINUITY OF DISCRIMINATION FRAMEWORK: A MODIFIED APPROACH TO SECTION 3 CLAIMS

While *Arlington*-style approaches to Section 3 claims are effective for newly-passed discriminatory election laws, these methods do not work for attempts to obstruct remedies for past elections violations. However, preclearance is the still appropriate remedy and should be pursued, as this entrenched form of discrimination is exactly the kind of post-Reconstruction era obstruction that made the VRA necessary. Therefore, a modified approach is necessary to reach the older violation and strike at the "root" of the discriminatory conduct.

This note adds to existing literature by focusing on how Section 3 preclearance could be applied to remedy cases. As Section 3-related caselaw develops further in the wake of *Shelby*, these scenarios are likely to become more frequent, encouraging further research. Subsection A describes current problems with remedy cases and the reasoning behind this note. Subsection B illustrates the matter through detailed review of two recent elections cases. Subsection C proposes an analytical framework in light of the issues discussed in these cases.

A. Background and reasoning of this note

As shown in *Veasey/Perez*, remedy cases introduce new wrinkles in the election-discrimination debate. When courts consider a remedy to a

[53] Abbott v. Perez, 138 S. Ct. 2305 (2018); Veasey v. Abbott, 888 F.3d 792 (5th Cir. 2018).

discriminatory law, they look to the remedy's comprehensiveness, or how completely it removes the discriminatory context of the previous device.[54] This leads to the question of whether or not the defendant (here, the state) is truly obligated to offer that complete solution to the extent of being liable for its failure to do so. That requirement may seem onerous if the state is being penalized for attempting to cure a decades-old law and coming up short. On the other hand, such vigilance may be necessary to prevent the state's willful protection of a discriminatory law.

As noted previously, neither courts nor scholars have given much attention to the legal doctrine involving remedial actions. This lack of guidance leaves key concerns hanging in the balance. For example, the legislature offering its purported remedy may still be composed of many of the same officials responsible for the original, offending legislation. The two bodies are different actors in the eyes of the court, yet in reality are the same entity. This "fox-still-in-charge-of-the-henhouse" situation may increase the likelihood of future discriminations unless the court is vigilant to the matter. The court must consider whether legislators are addressing a past instance of intentional discrimination or attempting to avoid/minimize the remedy. This uncertainty has received uneven treatment in the courts, prompting criticism from the legal community. Confusion over what precisely is required is one of the pitfalls of distorted legal reasoning and provides cover for disingenuous arguments in favor of restrictive laws.

In light of these issues, courts should adopt a judicial framework for assessing state remedies to past election discrimination. Such an approach gives related decisions the necessary integrity and predictability to ensure just outcomes and disincentivizes electoral misconduct. Through this framework, the court should consider: (1) whether the source of the remedy and original discriminatory device are substantially the same entity, (2) the intervening number of years between the discriminatory device and its remedy, (3) the comprehensiveness of the remedy, and (4) the process of creating the remedy.

The next section examines two recent Texas cases involving VRA intentional discrimination claims, *Veasey v. Abbott* and *Abbott v. Perez*, which both illustrate the need for a judicial framework. These cases featured different devices—one a redistricting plan, and the other a voter ID law—but both required their respective courts to examine the state legislature's purported remedy.

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[54] Veasey, 888 F.3d at 818–19 (The Fifth Circuit interpreted the *McCrory* court as focusing on the "lingering burdens" of laws passed with discriminatory intent. As discussed in *McCrory*, these laws require a complete remedy due to the "broader injury" they inflict than those of discriminatory effect.); *see also* Green v. Cty. Sch. Bd., 391 U.S. 430, 438 (1968).

B. Case Illustrations

i. Veasey v. Abbott

The first case, *Veasey v. Abbott*, concerns a voter ID law, SB 14, enacted by the Texas Legislature in 2011.[55] This regulation was the strictest voter ID law in the nation, severely narrowing the options for acceptable documents for proving identity. Before this bill's enactment, Texas voters were allowed to use a large variety of documents to prove their identity for voting purposes. With the new change, the list was reduced to only seven documents, which needed to be unexpired to be valid.[56] The disenfranchising effects of these new requirements were severe—experts reported the affected parties could number to over 600,000 eligible voters[57] Further, these effects were disproportionately felt by African Americans and Latinos.[58]

SB 14: The Problem

Per the Voting Rights Act requirements, Texas sought preclearance for SB 14 in federal court.[59] Several private plaintiffs and the Department of Justice filed complaints in response, alleging a violation of Section 2 of the VRA among other claims.[60] The D.C. District Court was not persuaded the bill could be enforced without disproportionately affecting minorities, rejecting the law in its 2012 decision.[61] In 2013, however, the *Shelby* decision freed Texas of its obligations under Section 5 of the VRA, clearing

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[55] Veasey v. Abbott, 265 F. Supp. 3d 684 (S.D. Tex. 2017).

[56] THE CAMPAIGN LEGAL CENTER, Veasey v. Abbott: *A Challenge to Texas' Harsh Voter ID Law,* https://campaignlegal.org/sites/default/files/Veasey%20v%20Abbott%205.18.16%20One%20Pager.pdf (last visited April 1, 2019) (SB 14's limitations were reportedly severe. As pointed out by voting rights advocacy groups, approved ID forms were limited to the following: a "Texas driver license issued by the Texas Department of Public Safety (DPS), Texas Election Identification Certificate (EIC) issued by DPS, Texas personal identification card issued by DPS, Texas concealed handgun license issued by DPS, United States military identification card containing the person's photograph, United States citizenship certificate containing the person's photograph, United States passport.").

[57] BRENNAN CENTER FOR JUSTICE, Texas NAACP v. Steen *(consolidated with* Veasey v. Abbott*)*, (September 21, 2018) https://www.brennancenter.org/legal-work/naacp-v-steen.

[58] *Id.*

[59] Texas v. Holder, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), *vacated and remanded,* 570 U.S. 928 (2013).

[60] *Id.*

[61] Holder, 888 F. Supp. 2d at 144–45.

the path for SB 14. The state promptly announced it would begin implementing the voter ID law.[62] In response, voter advocacy groups and the Department of Justice filed complaints at the U.S. District Court for the Southern District of Texas.[63] The district court found SB 14 was enacted with a racially discriminatory purpose, had a racially discriminatory effect, and unconstitutionally burdened the right to vote.[64] On appeal, the Fifth Circuit affirmed SB 14 violated the VRA, and ordered the lower court to fashion an interim remedy to balance the plaintiffs' and state's interests.[65]

SB 5: The "Remedy"

In June 2017, the Texas legislature passed SB 5, which it claimed was a remedy to the objectionable parts of SB 14.[66] The differences between the bills were minor.[67] The legislature did not meaningfully address the limited range of acceptable voter ID and its disproportionate effect of African American and Latino voters.[68] Voting rights advocates argued this "remedy" was still unacceptably restrictive, and requested a permanent injunction against both SB 14 and SB 5.[69] In considering this question, the district court guided its analysis by comparing SB 5's terms with SB 14's failings, as well as the historical record, predictions for the future, and "the legislature's choice to build on the existing SB 14 framework rather than begin anew with an entirely different structure."[70] Ultimately, the court agreed SB 5 perpetuated the discriminatory purpose of SB 14, citing the bill's inadequate remedies as well as its chilling effect on voting.[71] Further, the court ordered a hearing to further consider whether

[62] Press Release, Tex. Att'y Gen. Greg Abbott, Statement on U.S. Supreme Court ruling regarding the Voting Rights Act (June 25, 2013) https://perma.cc/SL53-AFSG.

[63] Veasey v. Perry, 71 F. Supp. 3d 627, 632–33 (S.D. Tex. 2014).

[64] *Id.* at 633.

[65] Veasey v. Abbott, 888 F.3d 792, 804 (5th Cir. 2018).

[66] *See* THE Campaign Legal Center, *supra* note 56.

[67] THE Campaign Legal Center, *supra* note 56.

[68] S.B. 5, 85th Leg., 85th Reg. Sess. (Tex. 2017) (For acceptable ID, SB 5 amended "United States passport" to state "United States passport book or card." SB 5 also enlarged the amount of time a qualifying ID may be expired from 60 days to 4 years. Voters over 70 years of age did not have a limit on the amount of time their ID may be expired.).

[69] Veasey v. Abbott, 265 F. Supp. 3d 684, 688 (S.D. Tex. 2017).

[70] *Id.* at 691–97.

[71] *Id.* at 694-97 (The district court was especially concerned with how SB 5 still discouraged voters who did not have ID approved under SB 14's narrow scope. Under the interim remedy, voters without SB 14-approved ID could still cast a vote if they selected one of seven provided reasons (under penalty of perjury), which included an "[o]ther" box. SB 5 removed this box, and so voters would have to select one of the provided reasons and face the threat of perjury if that reason did not conform.).

Texas should be "bailed-in" under Section 3(c) of the Voting Rights Act and subjected to preclearance.[72]

The Fifth Circuit reversed this ruling on appeal.[73] In a divided opinion, the court held SB 5 presented an effective remedy to the discriminatory aspects of SB 14 and allowed Texas to implement SB 5.[74] The lead opinion stated "the court had erred in apparently presuming, without proof, that any invidious intent behind SB 14 necessarily carried over to and fatally infected SB 5."[75] As the opinion stated, the courts must defer to the legislature's proposed remedy to an unconstitutional law, unless the remedy itself is found to be unconstitutional.[76] Ultimately, the circuit court found the district court had erred by failing to defer to SB 5.[77]

As for the merits, the Fifth Circuit believed it was possible for alterations to an unconstitutional law to remove its "discriminatory taint," notwithstanding the intent of the original drafters.[78] To consider this question, the court stated it was necessary to consider evidence such as the state of mind of the subsequent legislature applying the remedy.[79] Ultimately, the court determined there was no evidentiary or legal basis for the district court to take the "drastic step" of enjoining SB 5.[80] Accordingly, the court decided there was no reason to subject Texas to ongoing preclearance under Section 3.[81]

ii. Abbott v. Perez

In 2011, organizations representing African American and Latino voters filed a series of lawsuits challenging the redistricting plans submitted by the Texas State Senate and House of Representatives.[82] The plaintiffs alleged the Texas legislature engaged in racial gerrymandering in violation of Section 2 of the Voting Rights Act.[83] At the same time, the Texas legislature requested preclearance for its redistricting plans from the U.S. District Court for the District of Columbia.[84]

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[72] *Id.*at 700.
[73] Veasey v. Abbott*,* 888 F.3d 792, 802–04 (5th Cir. 2018).
[74] *Id.*
[75] *Id.* at 801.
[76] *Id.* at 802.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 804.
[81] *Id.*
[82] BRENNAN CTR. FOR JUSTICE, *Abbott v. Perez* (August 2, 2019), https://www.brennancenter.org/legal-work/perez-v-perry.
[83] *Id.*
[84] Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018).

While the redistricting challenge and preclearance matter were being considered, the 2012 primary elections approached.[85] To address this exigency, the Texas District Court created a remedy in the form of an interim redistricting plan.[86] The court noted as a disclaimer that this remedy was created on an expedited basis, without the benefit of all relevant facts.[87] Therefore, the remedy still contained many of the issues to which plaintiffs objected and would need further changes.[88] The U.S. Supreme Court struck down the first remedy because it found the district court's remedy had not been sufficiently deferential to the legislature's judgments.[89] The district court submitted a new remedy afterwards addressing this issue.[90]

The U.S. District Court of D.C. denied Texas's original preclearance request, concluding the redistricting plans had been drawn with discriminatory intent and diluted African American and Latino votes.[91] The supposedly-temporary interim maps approved by the District Court were used in the 2012 elections, but the legislature declined to take any action during the 2013 legislative session to resolve the still-present issues mentioned by the court.[92] Instead, the legislature convened a special session, during which they adopted the District Court's interim maps without any changes.[93] The governor signed this plan into law.[94]

After the *Shelby* decision, plaintiffs amended their complaints, alleging the map approved by the legislature violated the 14th and 15th Amendments.[95] In the ensuing litigation, plaintiffs argued the approved 2013 map was largely the same as the interim one.[96] The "new" map preserved many of the features from 2011 the district court held were unconstitutional and indicative of discriminatory intent.[97]

In August 2017, the Texas District Court held the discriminatory intent found in the 2011 maps was carried into the 2013 ones.[98] As the court stated, the 2013 legislature adopted the court's previous interim plan

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[85] *Id.*

[86] *Id.*

[87] *Id.* at 2346 (Sotomayor, J., dissenting) (quoting Perez v. Abbott, 274 F. Supp. 3d 624, 650 (W.D. Tex. 2017)).

[88] BRENNAN CTR. FOR JUSTICE, *supra* note 82.

[89] Perez, 138 S. Ct. at 2345 (Sotomayor, J., dissenting).

[90] *Id.*

[91] *Id.* (quoting Texas v. United States, 887 F. Supp. 2d 133, 159, 161, 178 (D.D.C. 2012)).

[92] *Id.* at 2317 (majority opinion).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] BRENNAN CTR. FOR JUSTICE, *supra* note 82.

[97] Perez, 138 S. Ct. at 2318.

[98] *Id.*

wholesale (despite the court's disclaimer) as a litigation strategy designed to protect the plans from any future challenges.[99] The legislature did not make any meaningful effort to change the maps or engage in a deliberative process to remove still-present discriminatory features.[100] As the court explained, the legislature intentionally transferred the discrimination originating from the old plans into the new ones.[101] The court then issued an order directing the legislature to either hold a special session for redistricting or prepare new plans before the court.[102]

In 2018, the U.S. Supreme Court agreed to hear Texas' appeal on the matter.[103] The Supreme Court reversed and remanded the district court's ruling, stating the lower court had inappropriately shifted the burden of proof to the state to show it had adopted the 2013 districting plans without discriminatory intent.[104] As the Supreme Court explained, a legislature's new redistricting plan is entitled to a presumption of good faith, and the past finding of intentional discrimination did not remove that presumption.[105] Instead, the challenger alleging intentional discrimination to the new plan bore the burden of proof.[106]

Here, the Supreme Court considered the 2013 map to be "new" and thus entitled to deference.[107] As the Court reasoned, the offending 2011 plans had not been enacted by the current legislature. The legislature enacted the Texas District Court's interim maps.[108] The high court read little significance into the connection of those interim maps to the offending ones, despite the district court's disclaimer. Instead, the Supreme Court opined the problems of the 2011 maps had not been carried into the 2013 maps.[109]

Significantly, the Supreme Court argued the district court erred in requiring the state to prove it had "removed the taint" of discrimination inherent to the 2011 maps.[110] The lower court could not penalize the 2013 legislature for declining to address still-present discriminatory elements in the plans.[111] According to the Supreme Court, previous discrimination

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[99] *Id.* (quoting *Abbott*, 274 F. Supp. 3d 624, 649–650 (W.D. Tex. 2017)).
[100] *Id.* (quoting *Abbott*, 274 F. Supp. 3d at 686).
[101] *Id.*
[102] BRENNAN CTR. FOR JUSTICE, *supra* note 82.
[103] BRENNAN CTR. FOR JUSTICE, *supra* note 82.
[104] Perez, 138 S. Ct. at 2325.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*

could only be considered as one factor in the totality of all circumstances surrounding the new legislation.[112] The Supreme Court concluded the discriminatory intent underlying the 2011 plans was not enough to prove the 2013 legislature had enacted the new plans with discriminatory intent.[113]

Veasey and *Perez* illustrate the need for a more definite framework to guide courts' analysis of remedies to discrimination. Both courts unequivocally rejected the notion that a past finding of intentional discrimination in a statute would shift the burden to the state to prove that its remedy cured all traces of intentional discrimination, or "removed its taint." However, the *Veasey/Perez* courts did concede a past finding of intentional discrimination was still appropriate to the analysis, albeit as one aspect of the general historical posture. As critics pointed out, however, both district courts clearly had not engaged in burden-shifting.[114] Instead, the courts had followed the favored traditional analysis—the evidence had simply been strong enough to overcome the state's favorable presumptions.

Regardless of whether one views Justice Reynold's characterization of the record as sincere or disingenuous, the potential for such a dispute points to an analytical problem.[115] While the lower courts' use of the *Arlington* analysis may have assigned the proper weight to the finding of past discrimination, the involvement of multiple actors allowed the higher courts to read burden-shifting into the decision. The *Veasey/Perez* cases thereby demonstrate how remedy cases present issues that require greater clarity.

Further, applying an unmodified *Arlington*-style test to remedy cases is illogical. The entire point of this analysis is to comprehensively address the social and political context of an election restriction. Applying this framework straightforwardly to a modification of a statute *already proven to be discriminatory in intent* – as if it were the any other law, free of any discriminatory context – is a deeply misguided approach. Such laws do not exist in a vacuum. To pretend as if they did is to exclude necessary

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[112] *Id.* (quoting Vill. of Arlington Heights, 429 U.S. at 267).

[113] *Id.*

[114] Daniel Tokaji, *Abbott v. Perez: Bad Reading Invites Discriminatory Redistricting*, TAKE CARE (July 6, 2018), https://takecareblog.com/blog/abbott-v-perez-bad-reading-invites-discriminatory-redistricting.

[115] *See* Perez, 138 S. Ct. at 2354 (Sotomayor, J., dissenting) (Justice Sotomayor's dissent in *Abbott v. Perez* argued the burden-shifting alleged by the majority had clearly not occurred, and the majority had manufactured an error of law by reading this into the lower court's opinion.); *see also* Daniel Tokaji, *Abbott v. Perez: Bad Reading Invites Discriminatory Redistricting*, TAKE CARE (July 6, 2018), https://takecareblog.com/blog/abbott-v-perez-bad-reading-invites-discriminatory-redistricting, (This argument was echoed by critics who alleged the majority's "creative appellate fact-finding" was merely a convenient way to avoid the deferential standard of review.).

context, such as the motivations underlying a statute's design. As demonstrated in *Veasey* and *Perez*, this can lead to a drastically mischaracterized record. Moreover, the straightforward analysis ignores longstanding legal doctrine holding that laws passed with discriminatory intent require a complete fix—the law must be comprehensively remedied, "root and branch."

C. The Continuity of Discrimination Framework

This section proposes an analytical framework for cases involving remedies to laws previously found to be intentionally discriminatory. A well-defined test for assessing these remedies would allow the courts to consider all the relevant evidence in its proper context, while also explicitly avoiding the burden-shifting that the *Veasey* and *Perez* courts found objectionable. Moreover, such an approach treats a proposed remedy for what it is—a modification that may potentially exist within a still-discriminatory framework. In light of these benefits, courts should adopt such a framework when trying future remedy cases.

i. Factor 1: Courts should consider whether the respective sources of a legislative remedy and the original discriminatory law are substantially the same entity.

The preclearance provisions of the Voting Rights Act were premised on the reasoning that actors who have conducted intentional discrimination in the past are likely to do so again. The burdens on sovereignty imposed by preclearance were justified because certain jurisdictions had shown determination in maintaining discriminatory laws and sophistication in strategies used to thwart intervention. Accordingly, anything less than continuous federal oversight would be ineffective for these "repeat offenders." The idea of past misconduct as a proxy for future violations is central to the VRA's underlying logic, thus such a consideration guides this framework.

This first factor represents the notion that an actor who authored a discriminatory device may be motivated to provide an ineffectual remedy in an attempt to preserve the original device's effects. If the authors of both devices are substantially the same entity, their shared mindset means that discriminatory intent is more likely to carry over. This reasoning applies to subsequent holders of the same government office—an agency that engaged in discriminatory policies in past years is likely motivated to defend these positions later.

Significantly, this reasoning also applies to the "collective identities" of legislatures. For example, the 106th legislature and the 108th legislature likely share a significant number of members. Consequently, the network of motivations that characterized the first body would be largely unchanged. While these two legislatures are technically separate bodies, they would be considered substantially the same entity.

Under the same-actor reasoning, a legislature could not avoid a court-ordered remedy simply because an intervening year made that legislature into a "new" elected body with presumably clean hands in regard to its prior violation. As shown by *Perez*/*Veasey*, preventing that mischaracterization is a worthwhile aim. If the actor responsible for the violation and the one authoring the remedy are substantially the same entity, then the court should weigh this factor toward a finding of intentional discrimination.

ii. Factor 2: Courts should consider the intervening number of years between the discriminatory device and its remedy.

A significant number of years between the original discriminatory device and the proposed remedy suggests a diminishing likelihood that the once-offending actor intends to perpetuate past discrimination. In such cases, the officials and/or other institutional actors responsible for the past misconduct are likely no longer present to renew their efforts. Conversely, an extremely short intervening period makes retrogression more likely. Longer intervening periods also allow for external factors such as public scrutiny and/or social criticism to take hold, disrupting the conditions that gave rise to the original violation.

Moreover, the consideration of time played heavily into the *Shelby* Court's original rejection of the "outdated" coverage formula. The Court primarily objected because the formula was based in information far removed from current conditions. It logically follows from this precedent that a short period of time since a prior discriminatory act suggests those conditions are unchanged, which weighs toward the likelihood of misconduct. Courts should infer an increased risk of obstruction from remedies that occur shortly after the original discrimination.

iii. Factor 3: The court should consider how comprehensively a remedial statute addresses the ills of the original discriminatory one.

While the *Perez* and *Veasey* courts rejected the requirement that a remedy cure all of the ills of its predecessor, neither court denied the scope of the remedy should be included in the analysis. How completely the remedy addresses its discriminatory statute is, of course, an essential factor although concededly should not be dispositive. While in some cases a minimalist remedy might suggest obstruction, a legislature making a good-faith attempt to comply with a court order should not be punished for an imperfect result.

The true value of the comprehensiveness factor lies in its interaction with the rest of the framework. Comprehensiveness alone may not be especially probative, but it becomes so when viewed in conjunction with other factors. For example, a state entity responding to a court order with an extremely *limited* remedy for that *same entity's* own *recent* constitutional violation would rightly be viewed with suspicion. On the other hand, if that state entity offered the same remedy for a separate actor's significantly older violation, then the remedy's limited scope would not suggest obstruction with the same force. Accordingly, courts should use a remedy's comprehensiveness to contextualize their other considerations.

iv. Factor 4: Courts should examine the process of constructing the remedy for evidence of obstruction.

Courts should examine the legislative history and/or other relevant details surrounding the drafting of a purported remedy. While the courts often consider the legislative history of challenged election laws, they generally search for evidence of affirmative discriminatory conduct. For example, in *McCrory*, the court focused on the legislature's addition of language designed to disenfranchise African American voters. In the context of a remedy, however, discrimination would manifest with more subtlety. Because the affirmative discrimination has already occurred, a nefarious actor would try to *minimize* or *obstruct* posed solutions to past discrimination rather than introducing new discriminatory elements.

A court's analysis of a remedy's legislative history should focus specifically on evidence of obstruction. The district court in *Veasey* demonstrated this analysis in its opinion by describing how the Texas legislature had suspiciously overlooked addressing any of the still-present infirmities of SB 14 when they constructed SB 5. Witnesses and interested parties asked about these oversights, but legislators offered no justifications and instead rushed the bill to a vote with minimal changes. As the court explained, these details were collectively persuasive of the legislature's obstruction efforts. Through this analysis, the court highlighted an effective approach to assessing a remedy's legislative history. Accordingly, this

framework should feature legislative analysis that is similarly focused on signs of obstruction.

CONCLUSION

Due to the inadequacies of other solutions, preclearance remains the sole effective means of halting election discrimination. In the wake of *Shelby*, scholars have offered promising approaches for re-introducing this method where needed. As recent cases have shown, these methods must now adapt to violations that involve attempts at obstruction. States engaged in sophisticated means of avoiding reform in the post-Reconstruction era and the countermeasures of today must show equal ingenuity.

In order to enforce the VRA in modern settings, courts must be vigilant to potential obstructions to reform. Courts can accomplish this by considering the relationship of the original offender and the actor tasked with the remedy. Courts must consider this relationship in terms of the parties' identities, conduct, and positions in the relevant course of events. Further, these details should be highlighted with enough clarity so as to prevent mischaracterization of the record. Through such an approach, courts can strike at the root of discrimination rather than its branches, ensuring such laws do not resurface.

"BABY DON'T BE CRUEL": THE NON-RETRIBUTIVE EIGHTH AMENDMENT VERSUS VENGEFUL VICTIMS

Robert J. McWhirter
Jeremy L. Bogart

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[1]

Before his death in 1305, William Wallace saw his executioners pull out his intestines and burn them before his eyes—there was nothing "*cruel and unusual*" about it.

Wallace gets special attention because he was "Braveheart" and Mel Gibson starred in a big movie about him. [2] But he was only one of thousands during British history to receive the well codified cruel traitor's death making it hardly unusual.[3] We could call his punishment an audio-visual aid, designed to deter others from ever challenging the king. But as this article will present, it was not for retribution or revenge. And, oddly from our way of thinking, Wallace's execution was for his own redemption, or as we would say, rehabilitation. The Eighth Amendment's coupling of "cruel and unusual" is the measuring rod for constitutional analysis of any punishment. Though we could argue American capital punishment today is "cruel,"[4] history provides many worse examples including Wallace as well as other common law (i.e., "usual") punishments throughout English history which included pulling out the tongue, slicing off the nose, cutting off genitals, and boiling to death.[5] As Justice Scalia argues, even the worst that

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[1] U.S. CONST. amend. VIII.

[2] BRAVEHEART (Paramount Pictures 1995).

[3] LEONARD W. LEVY, *Origins of the Bill of Rights*, 31 J. INTERDISC HIST, 234–35 (Yale Univ. Press ed., 1st ed. 1999) [hereafter LEVY] (explaining that in death by drawing and quartering, "the victim, if male, was hanged but cut down while still alive [the hanging supposedly dulled the pain]; his genitals were cut off and burned before him; he was disemboweled, still alive, and then he was cut into four parts and beheaded . . . . Women convicted of treason were sentenced to being burned alive, although they were usually first strangled until unconscious."); LEVY at 235 (continuing that parliament did not prohibit drawing and quartering for treason until 1870 but it was last inflicted in 1817 and burning of women ended in 1790).

[4] *See, e.g.*, W. Noel Keyes, *The Choice of Participation by Physicians in Capital Punishment*, 22 WHITTIER L. REV. 809, 809–10 (2001) (noting that the American Medical Association has issued a policy statement that doctor participation in any aspect of an execution is unethical).

[5] Levy, *supra* note 3, at 234–235. (William Blackstone listed the following: "Of these [crimes] some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of

we do today must be constitutional compared to these horrors in common practice at the time of the Eighth Amendment's passing, "[t]he death penalty, for example, was not cruel and unusual punishment because it is referred to in the Constitution itself…."[6] This is the originalist standard for judging "cruel and unusual." [7]

But the Eighth Amendment in the context of its history presents an originalist dilemma: the words "cruel and unusual" are among the most subjective in the constitution, which the framers themselves recognized. This begs the question of what happens to the mantra of original intent when there may have been no "original intent."

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terror, pain or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savor of torture or cruelty; a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn, and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies; others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender by slitting the nostrils, or branding in the hand or face. Some are merely pecuniary, by stated or discretionary fines; and lastly there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain, and these are inflicted chiefly for such crimes which arise from indigence, or which render even opulence disgraceful. Such as whipping, hard labor in the house of correction, the pillory, the stocks, and the ducking-stool. Disgusting as this catalogue may seem it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment, to be met within the criminal codes of almost every other nation in Europe." Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 862-63 (1969) [hereinafter Granucci] (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *369–72).).

[6] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989); *see* Harmelin v. Michigan*,* 501 U.S. 957, 975–83 (1991) (joint opinion) (Scalia, J.); *see also* McGautha v. California, 402 U.S. 183, 226 (1971); *cf.*); Ewing v. California*,* 538 U.S. 11, 31 (2003) (Scalia, J., Concurring) (Eighth Amendment prohibits "only certain *modes* of punishment"); *see generally* Aimee Logan, Note, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 195–220 (2008).

[7] South Carolina v. United States, 199 U.S. 437, 448 (1905) (Justice Brewer wrote that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which is meant when adopted it means now." If a word does alter, then "a written instrument" would be a false alter indeed).

After discussing the subjectivity of the words themselves, however, this article will suggest that whatever "original intent" that did exist presented the following: The Eighth Amendment's legislative history within its historical context shows that retribution was not a goal of punishment. Thus, original intent would negate the foundation of modern penal statutes centered on the punitive goal of retribution and the revenge element of victim's rights. Perhaps then the constitutional question should not be as simple as whether a given punishment or death penalty passes Eighth Amendment muster, but instead the realization that the revenge basis of modern criminal punishment has helped create a society the founders of our country never intended.

I. *"DON'T BE CRUEL"* – THE SUBJECTIVITY OF IT ALL

What would the framers in 1789 have done with Elvis Presley's 1956 hit, *"Don't be Cruel"*? [8] (One would be hard pressed to imagine John Adams saying it to Abigail). Words evolve and we know that "cruel" had a different connotation in the seventeenth century.[9] Moreover, words are relative to personal experience, especially a word such as "cruel." All punishment is "cruel" to somebody but not necessarily "unusual" to everyone. More pertinent to constitutional interpretation is that the words are also relative to the age, as Elvis demonstrates.[10]

Indeed, at the time the framers recognized that the terms "cruel and unusual" were subjective.[11] James Madison proposed what ultimately became the Eighth Amendment on June 12, 1789.[12] The sum total of

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[8] Elvis Presley, *Don't Be Cruel* (RCA Victor Studios 1956). Elvis released this as a single with *Hound Dog* on the other side. Written with Otis Blackwell, this is the only record to have both sides reach number one on the pop charts Song Facts, http://www.songfacts.com/detail.php?id=1140 (last visited January 13, 2008). See the lyrics at http://www.lyricsfreak.com/e/elvis+presley/dont+be+cruel_20048329.html (last visited January 13, 2008). Watch Elvis sing *Don't Be Cruel* at https://www.youtube.com/watch?v=2d5FW0mUPiM (last visited October 06, 2019).

[9] GRANUCCI, *supra* note 5, at 860.

[10] *See* Harry F. Tepker, *Tradition & the Abolition of Capital Punishment for Juvenile Crime*, 59 OKLA. L. REV. 809, 814–15 (2006) [hereinafter Tepker] (showing the historic relativity of the terms "cruel and unusual"). *See also* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1030–32 (1978) (arguing the framers' use of a moral concept of "cruelty" rather than specifically enumerated list of prohibited punishments demonstrates the validity of an evolving standard).

[11] Tepker, *supra* note 10, at 814.

[12] Noah Webster, *Reply to the Pennsylvania Minority: "America,"* N.Y. DAILY ADVERTISER, (N.Y.), Dec. 31, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION : PART ONE, SEPTEMBER 1787-FEBRUARY 1788 (LIBRARY

legislative comment at the passing of the Eighth Amendment in Congress comes from representatives Smith of South Carolina and Samuel Livermore of New Hampshire and demonstrates this relativity:

> MR. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
>
> MR. LIVERMORE. The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine.
>
> No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping; and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?
>
> If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.[13]

After this brief exchange, the record states "[t]he question was put on the clause, and it was agreed to by a considerable majority."[14] So, for

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OF AMERICA) 553, 559 (Bernard Bailyn ed., 1993) (Regarding the concurrent subjectivity of terminology during the Constitutional debates before ratification and the subsequent Bill of Rights see the statement of Noah Webster, an advocate of a national constitution and author of America's first great dictionary who stated the common sense of the problem:

"[U]nless you can, in every possible instance, previously define the words *excessive* and *unusual*—if you leave the discretion of Congress to define them on occasion, any restriction of their power by a general indefinite expression, is a nullity—mere *formal nonsense*.").

[13] House debate discussed and quoted in Furman v. Georgia, 408 U.S. 238, 243–-45, 262–-63 (1972), *and* Weems v. United States, 217 U.S. 349, 368–69 (1910). *See also* Tepker, *supra* note 10, at 815 (citing 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1834)), *and* GRANUCCI, *supra* note 5, at 842.

[14] 1 ANNALS OF CONG. 782–83 (1789).

Representative Livermore and "a considerable majority" the clause that became our Eighth Amendment was not clear —if it reflected anything it was "a great deal of humanity."

With an eye to this history, the modern Supreme Court's reading of the Cruel and Unusual Clause is well founded.[15] What is "cruel and unusual" must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and punishment must accord with the "dignity of man."[16] And as the Supreme Court has most recently articulated in *Kennedy v. Louisiana*, "the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail'."[17]

Today we do not condone whipping or cutting off ears.[18] Moreover, we should view Representative Livermore's brief catalogue of the

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[15] *See e.g., Weems*, 217 U.S. at 378 (stating the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.").

[16] Trop v. Dulles, 356 U.S. 86, 100–01 (1958). *See also* William C. Heffernan, *Constitutional Historicism: An Examination of the Eight Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1448 (2005) (arguing that the jurisprudence on the punishment's clause conforms to the need to apply the constitution to different issues); Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishment to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent,* 99 DICK. L. REV. 419, 420–423 (1995) [hereinafter Bukowski], Celia; Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP.L.REV. 661, 697 (2004); Granucci, *supra* note 5, at 843, Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 51–53 (2000), Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J. OF L. & PUB. POL'Y, 119, 158–59 (2004-2005).; Pressly Millen, *Interpretation of the Eight Amendment – Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L. J. 789, 84–108 (1984) ("*Weems* would allow courts freely to decide what is "cruel and unusual," as the Eighth Amendment's adopters intended, without the scope of review being bound by narrow historical constraints."); Schwartz & Wishingrad at 793–800. On *Weems'* break from earlier Eighth Amendment cases, *see* Claus, *supra* note 16, at 152–53 and GRANUCCI, *supra* note 5, at 842.

[17] *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting Weems, 217 U.S. at 367).

[18] Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918) (finding that sterilization may be somewhat akin to cutting off ears and was held cruel and unusual), *Contra State v. Feilen*, 70 Wash. 65 (1912). *See* Clause at 143, 154. (explaining that a whipping was an official punishment under federal law until 1839 and in some states long after), *See also* State v. Cannon, 55 Del. 587 (1963) (upholding a whipping sentence as late as 1963 in Delaware's highest court).

punishments, "hang a man, villains often deserve whipping, and perhaps having their ears cut off,"[19] not so much as an endorsement but a recognition that the limitations of his day made them a temporary necessity. In 1789 there were virtually no prisons,[20] or as Livermore said, "a more lenient mode of correcting vice and deterring others from the commission of it …."

A. Cruel and Unusual as Non-Retributive

Certainly representatives Smith and Livermore and "a considerable majority" were talking about punishment, which is by definition *punitive*. But, the context of their discussion was the penal goals of "correcting vice," which we call rehabilitation, and "deterring others." Absent from this context is even a nod to retribution.

The Eighth Amendment reflects history. When either the framers spoke, or we speak, of punishment being "cruel" or "unusual," or even "cruel and unusual," it comes from perspective. A "cruel" or an "unusual" punishment is one that is out of balance with a cultural norm. Or, to put it another way, the punishment is out of proportion. Although proportionality can form the basis for arguing retribution, the history shows that its goal was different. This history was the framers and ours.

i. "Cruel and unusual" from Lex Talionis and the Soul's Redemption

Ancient Israel: Proportionality is an ancient concept. The bible speaks of "an eye for an eye,"[21] which though often used today as an argument for

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[19] *See* Furman v. Georgia, 408 U.S. 238, 243–-45, 262–-63 (1972).

[20] The prison reform movement did not succeed in creating the "penitentiary" system until the mid-1800s. *See generally* David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY at Chapter 4 (Norval Morris, David J. Rothman, 1995).*1789-1865*. One must still question, however, this supposedly not "cruel and unusual" prison system that yields some odd results. For example, in Rummel v. Estelle, 445), the Supreme Court held that a life sentence for three minor felony thefts aggregating in $229.11 was not a "cruel and unusual" punishment. *Rummel v. Estelle*, U.S. 263, 285 (1980). By any measure, this is an absurd result. To choose between flogging, which even Justice Scalia would find "cruel and unusual," and the life sentence the Supreme Court blessed in *Rummel* would be for most of us an easy choice - give me a good flogging any day! *But see* Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378 (1980) (arguing that *Rummel* was "fundamentally sound" using a thorough historical analysis that only a law professor could love).

[21] THE JERUSALEM BIBLE, 162 (Jones ed. 1966) (*Leviticus* 24:19–20) ("If a man injures

retribution, this "eye for an eye", or *lex talionis*,[22] is actually about balance in punishment.[23] *Lex talionis* avoids the potentially disproportionate blood feud common in tribal societies.[24] The Eighth Amendment incorporates this ancient sense of proportionality.[25]

But the "eye for eye, tooth for tooth" concept did not give license to a victim or judge to start gouging eyes and pulling teeth. Rather, *lex talionis* reflects not punitive or retaliatory values in ancient Jewish law but instead the standard of compensation or making the community whole.[26] The law expected a defendant to pay back the value of an eye or tooth or life, not necessarily forfeit one's own.

Certainly, the death penalty is biblically old. Mosaic law listed thirty-six capital crimes including, "adultery, sex perversion, incest, homosexuality, blasphemy, idolatry, false prophecy, profaning the Sabbath, witchcraft, polytheism, sins against parents, kidnapping, treason, and murder."[27] Although this list seems long to our modern eye, capital sentences were actually uncommon.[28] Procedural rules in Jewish law made

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his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered."). *See* LEVY at 231, 410; Tepker at 816, *supra* note 3, at 410, *supra* note 10,

[22] *See* GRANUCCI, *supra* note 9, at 844 (stating the term *lex talionis* is a law of proportionality as Latin words "– lex = "law" and "talio" mean "law" and = "equivalent to" or "equal" respectively).– a law of proportionality.

[23] Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, UTAH L. REV. 505, 509-510; 526 (1998) (concluding the biblical verse "eye for eye" and *lex talionis* reflects not punitive or retaliatory values in ancient Jewish law but instead the standard of compensation or making the community whole); *See* J.W. Ehrlich, THE HOLY BIBLE AND THE LAW 189-90 (Oceana Publ'ns Inc.,1962) (noting that the "eye for eye" concept "established a fixed limit to retaliatory punishment"). *See also* Jack B. Weinstein, *Does Religion Have A Role In Criminal Sentencing*? 23 TOURO L. REV. 539, 542 (2007) (outlining historically the Jewish law against capital punishment); ALEX KOZINSKI, Sanhedrin II, 16 New Republic 16 (Sept. 13, 1993), at 16 ("[T]he Talmud tells us, a Sanhedrin that upheld an execution in seven years or even in seventy years was scorned as a bloody court.").

[24] *E.g., Ecclesiastics* 8:5 (King James) ("Reproach not a man that turneth from sin [crime], but remember that we are all worthy of punishment"); Deuteronomy 25:3 (King James) (if a person be adjudged wicked, order him beaten but no more than forty stripes, because above that number "thy brother should seem vile unto thee").

[25] GRANUCCI, *supra* note 9, at 844–46 (tracing the constitutional ban on excessive punishment to the Old Testament and other elements of Western tradition).

[26] Rosenberg & Rosenberg, *supra* note 22, at 526.

[27] EHRLICH, *supra* note 22, at 50. *See also* Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751, at 760-62 (2004) (discussing capital offenses in Hebrew law, negligent homicide, and killing a burglar).

[28] Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, (2004) [hereafter Rosenberg & Rosenberg *God's Mercy*].

it very difficult to convict a person. The Rabbis designed it this way to protect the sanctity of life.[29]

Trial procedures favored the defendant giving him every chance for acquittal. For example, circumstantial evidence was disallowed and confessions were inadmissible.[30] Also, Jewish law required at least two competent and independent witnesses to prove a fact.[31] Any discrepancy between the witnesses, even minor, disqualified the testimony.

The judges who heard capital cases interrogated the witnesses rigorously on even the most tangential facts. They would then discuss the case overnight, seeking any possible basis for acquittal.[32] In the Sanhedrin, the high court, favorable evidence to the defendant had greater weight than unfavorable and the voting procedure on the death penalty favored the defendant.

Even after trial, the courts allowed the convicted defendant to return to court with any favorable evidence, even if he was on the way to his execution.[33] While traveling to the execution site, at some distance from the court, court officials would shout out the convict's name and crime calling for any exculpatory evidence.[34]

The condemned man also deserved a humane death with efforts to minimize suffering and humiliation.[35] In terminology similar to later Christian Medieval Europe, the condemned merited "a favorable death."[36] He received "frankincense and wine to dull his senses" to make the

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[29] *Id.* at 1178 (noting that the proof and evidence rules in the rabbinic courts amounted to a supercharged Bill of Rights). *See also id.* at 1208-09 ("The difficulty of conviction [in Jewish law] effectively emphasizes the sanctity of beings created in God's image. In America, on the other hand, executions have become almost numbingly routine, particularly in some jurisdictions, making ours, in a sense, a death-oriented society in which life, if not cheap, at least has less value."). *See also;* Hiers, *supra* note 26, at 797-800.

[30] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination,* 63 N.Y.U.L. REV. 955, 1031-41 (1988) (discussing the nearly absolute Talmudic prohibition against using confessions in criminal cases).

[31] Rosenberg & Rosenberg, *supra* note 27, at 1179; (*citing Deuteronomy* 17:6, 19:15; *Numbers* 35:30 ("Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die"); *see also* Ehrlich, *supra* note 22, at 52.

[32] Rosenberg & Rosenberg *supra* note 27 at 1179, 1190.

[33] Rosenberg & Rosenberg *supra* note 27 at 1190-91 (noting that the Jewish law allowed the defendant to "return to court as many times as necessary to articulate all possible exonerating arguments). This is contrary, of course, to contemporary cries that there are far too many appeals in capital cases.

[34] Rosenberg & Rosenberg *supra* note 27 at 1180.

[35] Rosenberg & Rosenberg *supra* note 27 at 1192.

[36] Rosenberg & Rosenberg *supra* note 27 at 1191-92.

execution less painful.[37] And even though the methods of execution—stoning, burning, beheading, strangulation—may seem harsh, each was carried out to avoid suffering and degradation.[38]

Thus, although biblical law seems harsher to our modern eyes, and prosecutors often use it today to argue for harsher punishments, in practice it actually was not so. The extensive procedural protections in Jewish law assured that these punishments rarely, if ever, occurred. If they were imposed, the procedures were conducted in a way that minimized pain and indignity to emphasize the sanctity of life.[39] Again, an eye for an eye was not about retribution but about proportionality to make the community whole.

The Greeks: Plato in *The Laws* supported the death penalty.[40] But, in a precursor to the drafting of the Eighth Amendment, Plato in the dialogue *Gorgias* has Socrates identify the goal of all punishment as correction and deterrence not retribution, "he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better."[41]

Plato presented Socrates' 399 B.C. trial and execution as the opposite of a just use of capital punishment. Socrates execution was wholly unjust because Socrates the philosopher had no need of state correction (as he argued to his detriment to the jury). His execution was not to deter evil but in fact deterred good.[42]

Plato's Socrates goes on to discuss the benefit of pain in punishment, "[t]hose who are improved when they are punished by gods and men, are those whose sins are curable; and they are improved, as in this world so also in another, by pain and suffering; for there is no other way in which they can be delivered from their evil"[43] Again, deterrence and rehabilitation surface as the goals of punishment, not retribution, the true motive behind Socrates' trial and execution.

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[37] Rosenberg & Rosenberg *supra* note 27 at 1186.

[38] Rosenberg & Rosenberg *supra* note 27 at 1191-99.

[39] Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505.

[40] PLATO, LAWS Book VIII, at Chapter 16 ("...if someone is proved guilty of a murder, having killed any of these peoples, the judges' slaves will kill him and throw him naked in a cross-road, out of the city; all the judges will bring a stone in the name of the whole State throwing it on the head of the corpse, then will bring him out of the State's frontier and will leave him there unburied; this is the law").

[41] Edward M. Peters, THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 5 (Norval Morris & David J. Rothman, eds., 1998).

[42] For a discussion of Athenian modes of punishment *see* Adriaan Lanni, *"Verdict Most Just": The Modes of Classical Athenian Justice*, 16 YALE J.L. & HUMAN. 277, 287 (2004).

[43] BENJAMIN JOWETT, THE DIALOGS OF PLATO TRANSLATED WITH ANALYSES AND INTRODUCTIONS 419 (3d ed. 1892).

Plato in his general support of the death penalty for deterrence certainly did not speak for all Greeks. Thucydides did not even uphold the value of capital punishment as a deterrent. He provides a long dialogue arguing the fallacy of the death penalty's value related to a rebellion in the island of Mitylene, "[w]e must not, therefore, commit ourselves to a false policy through a belief in the efficacy of the punishment of death, or exclude rebels from the hope of repentance and an early atonement of their error."[44] Thus, the Ancient Greeks reflected a view of capital punishment as complex as our own.

The Ancient Greeks are the source of any number of philosophical arguments on proportionality in many aspects of life including punishment. Aristotle considered inequality in punishment an injustice. Aristotle stated that in a case of assault or homicide the action and the consequences of the action may be represented as a line divided into equal parts and "[w]hat the judge aims at doing is to make the parts equal by the penalty he imposes . . . ."[45] This proportionality encompassed the concept both of deterrence and correction, but did not focus, unlike our modern age, on retribution.

The Anglo-Saxons: The Anglo-Saxons had the *lex talionis* concept as well. King Alfred codified the *lex talionis* in England around 900 A.D.[46] Later, King Edward the Confessor incorporated the concept of proportionality in his laws.[47] Thus, the concept that the punishment should fit the crime has a long tradition in English law.

But, as with ancient Israel, the point of *lex talionis* was to make the community whole, not to seek violent retribution as a goal of punishment. The Anglo-Saxon punishments for murder reflect the proportionality concept. If you killed someone you answered to his family, clan, or tribe. The Anglo-Saxon courts, the *moots*, worked to prevent a blood feud and determined the reparation to the victim's family called the *wergild.*[48] The

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[44] THUCYDIDES, THE PELOPONNESIAN WAR, (1954 Rex Warner trans.) 212-22.

[45] *See* Granucci, *supra* note 9, at 844-46; ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 148-49 (J.A.K. Thomson trans., Penguin Classics ed. 1955).

[46] Granucci, *supra* note 9, at 844-45 (discussing the Anglo-Saxon fine schedule and noting that Germanic peoples had the fixed punishments called the Gulathing and Frustathing Laws).

[47] *See* LEVY, *supra* note 3, at 232; Rumann at 666.

[48]The word *weregild* is composed of *were*, meaning "man" in Old English and other Germanic languages (as in *werewolf*) and *geld*, meaning "payment." *Geld* is the root of English *gilt* and is the Dutch, Yiddish, and German word for money. Wergild in practice may have existed for long after is officially fell into disuse. Green at 694.Something akin was the Welsh compensation payments to avoid blood feuds in the "laws of Hywel Dda" named after Hywel Dda ("the good") who was king of most of modern day Wales in 949. BAKER at 30. On proportionality in homicide cases in ancient Jewish law, *see* Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751, 806-09 (2004); *see also* Irene Merker Rosenberg & Yale L. Rosenberg & Bentzion

victim's social rank determined the amount. The killer's intent was unimportant because the law recognized no *mens rea* to make an act a crime and, indeed, the law recognized no difference between crime and tort.[49] Accidents to premeditated murder all demanded the *wergild*.[50]

A variation of the *wergild* was the *murdrum*, which the Normans revived from the older *Danelaw* in England.[51] The *murdrum* applied to an Anglo-Saxon who killed a Norman, a likely occurrence with a lot of unhappy Anglo-Saxons after the Battle of Hastings in 1066 A.D. The *murdrum* involved a very large fine to the king for such a killing. Moreover, the Normans assumed that any dead body was Norman, unless the locals could prove he was Saxon. If not proven a Saxon, the village had to pay the *murdrum*. Our word *murder* comes from *murdrum*.[52] Like the *wergild*, it also had an element of proportionality. The Normans required a set fine for a Norman's killing - not the destruction of the Saxon village or other reprisal. Again, it was about deterrence, not retribution.

The Middle Ages: Medieval punishments could be cruel, even gory, but they were uncommon. Moreover, retribution was not a justification for punishment as it is today. Rather, the main point was rehabilitation and, to a lesser extent, deterrence. Even a death sentence was rehabilitative because it redeemed the offender (sinner) for God.[53]

S. Turin, *Murder by Gruma: Causation in Homicide Cases Under Jewish Law*, 80 B.U. L. REV. 1017, 1021, 1052-59 (2000) (hereafter *Gruma*) (noting the lack of anything like felony murder); *see also* EHRLICH at 130 noting that the Hebrew bible states that "*Thou shalt not commit murd*er" but the Protestant and Catholic bibles state that "*[t]hou shalt not kill.*"

[49] On the development of *mens rea, see* A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 355-60; *see also* FREDERICK G. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 182 (1990); George Jarvis Thompson, *History of the English Courts to the Judicature Acts*, 17 CORNELL L. Q. 9, 13-17 (1932).

[50] *See* Frederick Pollock, *English Law Before the Norman Conquest*, 14 L.Q. REV. 291, 299, 302 (1898) (noting that private vengeance in Anglo-Saxon times drew no distinction between willful, negligent, or accidental killings—rather, the issue was the number of cattle for payment). *See* Thomas A.); *see also* Green, *The Jury and the English Law of Homicide, 1200-1600,* 74 Mich. L. Rev. 413, 417 (1976) [hereinafter Green, *Homicide*] *supra* note 47, at 417 (noting that the earliest "dooms," i.e. Anglo-Saxon laws or decrees, only record the level of compensation for homicides).

[51] On *murdrum* fines and *wergilds, see* Green, *Homicide* at 419.

[52] KIRALFY, *supra* note 48, at 366; *see also* Green, *supra* note 47, at 456 (showing that even long after the Norman Conquest, the *murdrum* continued to exist. The *murdrum* boosted the Treasury, which the common people resented especially when crown officials applied it to any death, not just homicide. Eventually it only applied to felonious killing and Edward III abolished it in 1340); *see also* J.M. Kaye, *The Early History of Murder and Manslaughter,* 83 L.Q. REV. 365, 366 (1967).

[53] Trisha Olson, *The Medieval Blood Sanction And The Divine Beneficence Of Pain: 1100-1450*, 22 J.L. & RELIGION 63 (2007) (Hereinafter Olson, *Blood Sanction*).

Through the late twelfth century there was no clean line between "sin" and "crime."[54] Penance was the key element of the criminal justice system. Penance acknowledged that under strict (i.e., retributive) justice all was lost. Grace was what you need whether it be God's, the lord's, or the victim's.[55]

The point of punishment, as in prior ages, was to make the community whole. The only difference was God's role in the process. For a medieval jurist/cleric, all wrongdoing, be it sin or crime, was an act of pride against God. Bringing the sinner/offender back to God—often through the intercession of a saint, bishop, or especially the victim—was the ultimate goal.[56] The modes of trial and punishment reflected these values providing many ways to get God's grace or pardon. These included *The Ordeal, Sanctuary, Benefit of Clergy, and King's Pardon and Pious Perjurers*. And, even if you received a death sentence, it was still about grace and not retribution as the *Medieval Blood Sanction* demonstrates.

The Ordeal: Until the mid-thirteenth century, proof was by the ordeal (i.e., *judicium Dei*). The Ordeal was not so much about determining guilt—the court probably already knew that and if not, God did—but about commutation. The goal of the ordeal ritual was about redeeming the guilty after his contrite confession. If the offender did not confess to his judge/confessor/priest and God still acquitted him after the Ordeal, the assumption was that he had confessed in his heart.[57]

Sanctuary and Pilgrimage: The medieval practice of Sanctuary had a similar purpose of reconciliation.[58] If a person facing the death penalty could make it to a church and if he paid legal compensation he would be spared.[59] The Anglo-Saxons, as with most of the medieval period, justice

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[54] Olson at 81 (*citing* G.R. EVANS, LAW AND THEOLOGY IN THE MIDDLE AGES 12-13 (Routledge 2002)). Indeed, English judges were clerics until the late 13th Century.

[55] Trisha Olson, *Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages*, 16 ST. THOMAS L. REV. 473, 474 (2004); *see also* Olson, *supra* note 52, at 73 (quoting the Laws of King Henry I (*Leges Henrici Primi*) that "with respect to an offender who has either confessed or is of manifest guilt, the proper course is to hand him over to the relatives of the slain man so that he may experience the mercy of those to whom he displayed none."). Such a concept of grace or forgiveness is not expressed in today's victim's rights movement.

[56] *See* Olson, *supra* note 54, at 518; *see also* Olson, *supra* note 52, at 72 (featuring St. Augustine).

[57] *See* Olson, *supra* note 54, at 517 (noting that ordeal literature's main theme is not the innocent acquitted but the guilty redeemed because of a contrite confession).

[58] *See generally* Olson*, supra* note 52 at 64, BAKER at 512-13. As early as the dooms (statutes) of King Ine, ruler of West Saxon from 688 A.D. to 725 A.D. provide for the practice of sanctuary in Britain.

[59] *See* Olson, *supra* note 54, at 476, 491-92; *see also Id.* at 479 (noting Sanctuary as a legal concept in the Theodosian Code and Olson II at 499 in the Laws of William and Edward the Confessor).

was a private matter. Sanctuary sheltered the person from private justice and avoided the blood feud.[60]

We tend to think of sanctuary as a place to flee, but it is more likely that the intercessor was more important than the place because the intercessor made the peace.[61] Again, as with the Ordeal, the practice allowed for God's grace through the intercession of the priest, bishop, or saint.[62] Surely this would happen "in the church" as a physical place but more importantly it happened "in the church" as a metaphorical place or community.[63]

Again, retribution was not a goal of criminal justice—that was for God—but rehabilitation and deterrence.[64] Indeed, retribution as a goal would not have been possible because the criminal/sinner would stand before God in no different position than the victim/sinner—unless, of course, the victim gave the criminal the grace of forgiveness raising both to heaven.[65]

Benefit of Clergy: Another way of getting grace, or as we would say avoiding criminal responsibility, was Benefit of Clergy. A tonsured and clothed cleric could avoid the king's justice and courts by claiming benefit of clergy (*privilegium cleri*) because they were outside the king's jurisdiction.[66] At first the practice was for a charged cleric to claim he was clergy, which a jury would decide after an "inquest of office." Later, the clergyman would accept a trial and if convicted claim the benefit. Given the very large numbers of clerics in England, Benefit of Clergy had a huge effect on the criminal justice system.[67]

The punishment in ecclesiastical courts was penance, which even if severe was better than hanging.[68] If the crime was really bad, a clergyman could be defrocked (literally lose his protective clerical clothes) thus assuring his punishment for a repeat offense.[69]

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[60] *Id.* at 494-96.

[61] *Id*. at 477 and 482. For Saint Augustine and sanctuary *see* Olson *Sanctuary* at 480, 502.

[62] *Id.* at 505, 508.

[63] The opposite of sanctuary was the law of outlawry. Olson, *supra* note 54 at 510. To be outside the community meant that the law no longer protected you. It was the civil equivalent to *ex communication*. *See generally* Paul R. Hyams, *The Proof of Villein Status in the Common Law*, 89 ENGLISH HIST. REV. 721 (1974).

[64] *See* Olson, *supra* note 54, at 477-78, 532, 535-41.

[65] *See* Olson, *supra* note 52 at 73 (quoting from the laws of King Henry I, *Leges Henrici Primi* (c. 1115)).

[66] *See generally* BAKER, *supra* note 47, at 513-15.

[67] On the procedure of "inquest of office," *see Id.* at 513.

[68] For an outline of the ecclesiastical court punishments, *see* Thompson, *supra* note 48, at 410-11.

[69] Because women could not be clerics, they could not plead the Benefit. However,

For most of its history, Benefit of Clergy was part of the conflict between church and king in England. Moreover, its history shows it to have been one of the most abused practices by encouraging impunity for "crimonious clerks."[70] But, as with the ordeal, sanctuary, and pilgrimage, benefit of clergy had the goal of grace, concord, and reconciliation. And, it showed that for most times and in most circumstances, the Church opposed the death penalty.

The King's (i.e., God's) Pardon: Another way of obtaining God's grace was through a pardon from his representative, the King. The Anglo-Saxon kings lacked unfettered pardoning power. The Norman kings, however, enjoyed a much wider pardoning prerogative. The King would give the grace of the pardon and thereby win grace for himself as well.[71] The distinction between felonies verses misdemeanors is important here because the King only had pardon power over felonies. In the common law, misdemeanors were lesser crimes, although they were still distinct from being what we would call a civil wrong or tort.[72] Felonies were a much more serious crime subjecting the convict to loss of life, lands, and personal goods (*chattels*).[73] The felon was at the King's mercy and thus could get the King's pardon or grace.[74]

The "Pious Perjurers"—Juries as Sentences: A defendant facing a medieval jury had a better chance than today.[75] For example, acquittal rates

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they could "pray the benefit of her belly." BAKER, *supra* note 47, at 517. The court could not order a female felon to be put to death if she was pregnant. Juries would often find this to allow a woman to avoid the automatic death penalty. If the Crown contested the pregnancy claim a jury of "matrons" would decide the matter and would generally find for the defendant.

[70] Perhaps in reaction to the Boston Massacre case, Congress abolished benefit of clergy in 1790, though it survived in some states and may even remain technically available today. Parliament finally abolished benefit of clergy in 1827. *See* Jeffrey K. Sawyer, *Benefit of Clergy in Maryland and Virginia*, 34 AM. J. LEGAL HIST. 49, 52 (1990).

[71] *See* Olson, *supra* note 52, at 72-73 (noting the literature on good kingship expressing the value of concord and reconciliation).

[72] BAKER, *supra* note 47, at 502. The word misdemeanor corresponds to the Latin *malefactum*. Today, it is a crime with a punishment of less than one year. *See, e.g.*, 18 U.S.C. § 3559. But, misdemeanors may have greater significance under the United States Constitution because Congress can impeach and remove from office the President or a judge for "high crimes and misdemeanors" and the definition of a "high" misdemeanor is for Congress to decide. U.S. CONST. art. II, § 4.

[73] BAKER, *supra* note 47, at 502.

[74] *See* Green, *supra* note 49, at 426-27; *see also* Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 L. & HIST. REV. 101, 118 (2007).

[75] J.G. BELLAMY, THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND: FELONY BEFORE THE COURTS FROM EDWARD I TO THE SIXTEENTH CENTURY 37-38 (1998) (hereinafter BELLAMY) (noting that Tudor criminal justice reforms showed conviction rates

for homicide cases in the fourteenth century were eight to ninety percent.[76] Moreover, from the end of Edward I's reign until the middle of the fifteenth century, the conviction rate for indicted defendants was between ten to thirty percent.[77] Much of this high acquittal rate was because there were no police detectives, crime labs, or medical examiners. But, the fact was the medieval English jury was a dependable source of God's grace, a value contrary to any retributive model of punishment.

Juries became the main way of deciding cases sometime after the Assize of Clarendon in 1166 and the Fourth Lateran Counsel of 1215. There was no plea bargaining and the jurors knew the punishments.[78] Thus, they effectively were the judge with clear and specific choices:

> "*quietus est*" = "he is acquitted;"
> "*suspendatus est*" = "he is hanged;"
> "*remittitur ad gratiam domine regis*" = "he is remitted to the king's grace" (this was part of the pardon discussed above usually for what we would call justifiable homicides and manslaughter).[79]

The common law sentencing was simple: a misdemeanor conviction meant punishment at the judge's discretion that did not touch life or limb, and a felony conviction meant the defendant was at the king's mercy with a fixed death sentence.[80] Thus, the jury controlled the sentence with its verdict. This power of juries to decide sentences and give mercy as the case demanded extended well into the modern period and the founding of the United States.[81]

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raising in certain cases); *see generally* Thomas A. Green, *Societal Concepts of Criminal Liability for Homicide in Mediaeval England*, 47 SPECULUM 669, 671 (1972) (recording the high acquittal rates).

[76] Green, *supra* note 49, at 431-32 (noting the lack of distinction in the law for murder vs. manslaughter and accounting for the verdicts because the jurors knew the penalty involved).

[77] BELLAMY, *supra* note 74, at 37.

[78] THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 at 28-64 (Univ. Chi. Press 1985) (noting that medieval law did not provide for manslaughter and juries would often twist facts to support a self-defense verdict); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 52-55 (1983) (noting nineteenth century jury nullification to temper overly severe laws).

[79] Green, *supra* note 49, at 423.

[80] BAKER, *supra* note 47, at 512.

[81] Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 95 (2006).

The Medieval Blood Sanction: If you were one of the relative few who did not get God's pretrial grace, what then? You would often face a grueling punishment, but the point was still concord and reconciliation, if not with the community then with God.[82]

Prison was generally not a punishment in the Middle Ages mainly because there were no prisons. Punishments then would be scourging, mutilation, or death.[83] Medieval people had a different notion of the meaning of suffering than we do—perhaps because they had more of it. We generally view suffering as something to always avoid. For medieval culture, however, pain had its own benefit.[84] In suffering one could share in the redemptive Passion of Christ. This is because body and soul were one substance and the body's pain leads to the soul's redemption.[85] And, who needed redemption more than a criminal/sinner? For medieval people, therefore, scourging, maiming and even torturous death were for the condemned's spiritual good and rehabilitation.

Given the redemptive nature of punishment, the ritual of execution was very important and loaded with spiritual imagery.[86] In the execution ritual, the bleeding body accessed God, bringing the soul along with it.[87] The key elements were that the criminal (sinner) confessed, atoned, and suffered steadfastly.[88]

The scaffold was like an altar with the sacrifice being the good death and mounting the scaffold ladder compared to moving up on the theological ladder of paradise. [89] The condemned was expected to forgive his executioner giving grace in the expectation of receiving grace.[90] Each event was not just public, but shared by the public to create reconciliation. In this, the sinner/criminal brought the community closer to God.[91]

The ritual, moreover, always allowed for the chance of God's intervention. If the ladder to the scaffold went missing or was too short,

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[82] Olson, *supra* note 52, at 65, 74-75 (noting that benefit of clergy, sanctuary, royal pardon, and high English acquittal rate prevented the blood sanction).

[83] *See* LEVY, *supra* note 3, at 234-35 (listing the historical English punishments by Blackstone).

[84] ROSELYNE REY, THE HISTORY OF PAIN 49 (1995) (noting that within medieval Christendom, bodily pain possessed an affirmative meaning as a sacrificial offering allowing one to share in Christ's passion or as purgation to gain redemption).

[85] Olson, *Blood Sanction* at 82-89, 92.

[86] *Id.* at 81.

[87] *Id.* at. 89.

[88] *Id.* at 112.

[89] *Id.* at 103, 118-19.

[90] *Id.* at 116-17.

[91] Olson, *supra* note 52 at 127 (discussing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 46 (1979)).

jurists took it as a sign that the accused was either innocent or had received God's mercy, *ad judicium dei*.[92]

Even the type of execution had spiritual significance.[93] For example, beheading represented the removal of the figurative crown from the sinner/criminal's head.[94] An allusion to Christ's "Crown of Thorns" naturally followed.

For common criminals, medieval executioners would use the "The Breaking Wheel," a torturous capital punishment device causing death by cudgeling (i.e., blunt force trauma with bone breaking force). The Wheel worked systematically to break all the bones on all the condemned's limbs long before death happened. But this manner of execution, which we would call "inhumane", had great spiritual significance. The Wheel, for instance, was also called "the Catherine Wheel" after Saint Catherine of Alexandria who was to be executed on one.

Medieval public executions probably did serve deterrence as well as spiritual values. But the jurists at the time were very clear that deterrence was not the focus of their justifications.[95] The executions were bloody and public, but infrequent contrasting with our age of frequent executions behind sealed prison walls. Rehabilitation was the state goal with a nod to deterrence.

II. THE NON-RETRIBUTIVE CONGRESS: THE "MODERN" CRIMINAL JUSTICE REFORM OF THE EIGHTEEN CENTURY

Back to Representatives Smith and Livermore and the First Congress. It would be difficult to know for certain the extent of their exact knowledge of the above history. But many at the time were classically educated. Although they lived in a culture accustomed to violent punishments, punishment was not primarily for a retributive purpose as it often is today.

Specifically, the Eighth Amendment was written at a time of reform in criminal justice. At its passage, the traditional punishments of pillorying, disemboweling, decapitation, and drawing and quartering were out of style. In fact, all forms of corporal/physical punishment (except the death penalty) disappeared in the early years of the republic.[96] One of the first things the

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[92] Olson, *supra* note 52 at 111.

[93] *Id.* at 117 (generally beheading was for the upper nobility, hanging for the masses, and burning at the stake for heretics or those who had committed particularly heinous crimes).

[94] *Id*. (*citing* SAMUEL EDGERTON, PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 126 (Cornell Univ. Press, 1985)).

[95] Id. at 70-81.

[96] *See* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?,* 46 UCLA L. REV. 1727, 1732 (1999); *Weems v. United States*, 217 U.S. 349,

new American states did after independence was to reform criminal law, making it less punitive.[97]

Although Justice Scalia is correct when noting the legality of the death penalty in 1789,[98] it was hardly a settled matter. Benjamin Rush of Pennsylvania, an influential founding father and signer of the Declaration of Independence, opposed capital punishment in *Considerations of the Injustice and Impolicy of Punishing Murder by Death* (1792) and *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society* (1787) stating flatly and in terminology that sounds very modern that "[i]t is in my opinion murder to punish murder by death."[99]

James Madison did not pull the words "cruel and unusual" out of the air. Rather, his wording is verbatim from the English Bill of Rights Section 10 of 1689, written exactly 100 years earlier, "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor *cruel and unusual* punishments inflicted."[100] Although what the English meant in 1689 was supposed to hold significance for what the framers of the Eighth Amendment meant in 1789,[101] 100 years had passed between the two and it was not a static century.

The Enlightenment was the difference. The Eighth Amendment was the product of a different age altogether. In 1689, Parliament passed the Bill of Rights to recognize what existed – the common law liberties from a

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389-400 (1910) (White, J., dissenting) (discussing the early attitudes toward the Eighth Amendment as forbidding the unusual cruelty in the method of punishment that the Framers condemned). As we shall see, the reaction to the punishment meted out to Titus Oates, including his pillorying, was a main source of the "cruel and unusual" clause.

[97] *See* Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 AM. J. LEGAL HIST. 55, 56 (2008).

[98] Scalia, *supra* note 6.

[99] *See* LEVY at 135-36 and Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 823 (1975) (a well quoted and documented account of enlightenment thinkers as the precursors showing the original intent of the 8th Amendment's framers). For Dr. Rush and the movement to abolish the death penalty in early America, *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 103-09 (2002); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989) (especially Chapter 3).

[100] LEVY at 231; GRANUCCI at 840, 852-53 (noting that the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689). Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1965 -1966). The only difference is that the Eighth Amendment states that excessive bail "shall," rather than "ought" not, be required but this does not appear to be substantive.

[101] *See, e.g.,* Claus at 130 ("The language of the English Bill of Rights meant for the Founders whatever it meant for the English.").

grasping monarch.[102] For the English it was not about law reform; they thought nothing of heaping subsequent cruelties on criminals and political dissidents.

For Americans a century later the world was very different. Our founders also had a Puritan cultural heritage sensitive to the "cruel" punishments suffered in England.[103] As products of the Enlightenment and the Puritan legacy, the Eighth Amendment's framers were expansive.[104] Certainly the framers wanted to protect the existing individual liberties, just like the Parliament men who wrote the English Bill of Rights, however, the Eighth Amendment encompasses an evolving notion of crime, proportionality, and punishment. Representative Livermore's statement that "[t]he clause seems to express a great deal of humanity, on which account I have no objection to it …" reflects the spirit of reform.

"Humanity" then was the point. Indeed, despite the easy barrage of criticism for not allowing the execution of child rapists, the Supreme Court in *Kennedy* recognizes this aspiration:

> The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. [105]

Or, as Representative Livermore stated in 1789,

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[102] Claus at 143; Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 49 (2000-2001).

[103] LEVY at 232-33 (noting the influence of Beale and objections to "cruel" punishments). Although Parr at 42 argues that "[n]either the English nor the Framers, however, intended to incorporate a guarantee of proportionality," he notes that the Eighth Amendment's framers did "misinterpret English history and intended to prevent certain modes of punishment. *See* Parr at 49.

[104] This English Bill of Rights language ended up in colonial legislation. However, predating the English Bill of Rights by almost 50 years was the Massachusetts Body of Liberties of 1641. Section 46 articulated that "[f]or bodilie punishments we allow amounst us none that are inhumane barbarous or cruel." Claus at 130-31. *See also* Granucci at 850; Rumann at 667. George Mason also wrote the English Bill of Rights language into the Virginia Declaration of Rights § 9 of 1776. Claus at 124–27; Tepker at 816. For passage in other states with variations on the formulation see Claus at 133. For the Confederation Congress' ban on "cruel and unusual" punishments in the Northwest Ordinance of 1787 *see* LEVY at 239 and Claus at 133.

[105] *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008).

> "[i]f a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it …"[106]

Thus, retribution as a basis for punishment, or to use the pejorative but no less descriptive term "revenge," does not further the Eight Amendment. This is true even when the retributive model wears the cloak of so called "victim's rights." Thus, an originalist should view with suspicion statutory scheme with retribution as a goal, especially as a basis for the death penalty. What the framers called on us to do is make our age more civilized than theirs, not less.

[106] *See* Furman v. Georgia, 408 U.S. 238, 243–-45, 262–-63 (1972).

THE BATTLE BETWEEN SCHOOLS' DISCIPLINARY MEASURES AND STUDENTS' STATE CONSTITUTIONAL RIGHT TO AN EDUCATION: A DISCUSSION ON SCHOOL DISCIPLINE AND A CALL FOR REFORM

Jose Cruz Zavala-Garcia
J.D. 2019 | University of San Francisco School of Law

INTRODUCTION

On January 18, 2008, a fight broke out at Southside High School in Beaufort County, North Carolina, between several groups of students.[1] During the fight, Viktoria King, a tenth-grade student, engaged in a minor fistfight with another female student.[2] The fight did not involve weapons and did not result in any serious injuries.[3] Yet, both girls were suspended for the rest of the school year and were denied access to the county's alternative school.[4] Alexa Gonzalez, a 12-year-old at Junior High School in Forest Hills, New York, wrote "I love my friends Abby and Faith" and "Lex was here 2/1/10" on her desk in Spanish class with an erasable marker.[5] The school deemed these markings vandalism.[6] As a result, Alexa was handcuffed, arrested, and detained at a New York City Police Department precinct in Queens for several hours before she was released.[7] While extreme, cases like Viktoria's and Alexa's are not rare. Students all over the country face disciplinary policies that deliver harsh predetermined punishments, rather than focusing on restorative practices because of zero-tolerance policies.

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[1] King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259 (N.C. 2010).

[2] Erik Eckholm, *School Suspensions Lead to Legal Challenge*, N.Y. TIMES (Mar. 18, 2010), https://www.nytimes.com/2010/03/19/education/19suspend.html.

[3] *Id.*

[4] *Id.*

[5] Stephanie Chen, *Girl's Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (Feb. 18, 2010), http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html.

[6] *See id.*

[7] Rachel Monahan, *Student Who Was Arrested for Doodling on School Desk Sues City for Excessive Force*, N.Y. DAILY NEWS (Apr. 02, 2010), https://www.nydailynews.com/news/student-arrested-doodling-school-desk-sues-city-excessive-force-article-1.163028.

The method of discipline that schools follow vary among states and school districts. There are few states laws on this point and school districts have the freedom to decide what should be done in particular situations. For example, an offense that results in a five-day suspension in one district, could result in a five-month suspension in another.[8] Suspension is when a student is temporarily prohibited from attending their regularly scheduled classes.[9] Usually, suspensions can be handled in two ways.[10] The first is an "in-school suspension" which is an alternative setting that removes students from the classroom for a period of time, usually while requiring students to attend school and complete their work.[11] The second is an "at-home suspension" which requires the students leave the school and remain home for a period of time.[12] Expulsion refers to the removal or banning of a student from a school system.[13] Assignment to alternative schools are often the means schools use to deal with students who traditionally would have been suspended or expelled.[14] Alternative schools allow students that have been suspended or expelled from school to continue to receive some education. Schools usually argue that expulsions and suspensions are necessary to maintain order and safety, and that expulsions and suspensions are imposed only for either the most serious offenses or repeat offenders.[15] Certainly schools have some leeway to impose punishments for serious violations that negatively impact order and safety. However, schools now use suspension or expulsion for a wide range of other conduct that previously would have been dealt with through, withdrawal of privileges, counseling, mediation, and other methods.[16] As a result, several schools have turned minor misbehaviors into grounds for suspension and expulsion. Consequently, suspension and expulsion rates in schools have doubled.[17]

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[8] *The Duke Legal Clinics, School Discipline: Suspension & Expulsion*, DUKE LAW, https://law.duke.edu/childedlaw/schooldiscipline/.

[9] *See Suspension*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2018).

[10] *See* Sarah Gonzalez, *In-School Suspension: A Better Alternative or a Waste of Time?*, STATE IMPACT (May 4, 2012), https://stateimpact.npr.org/florida/2012/05/04/floridas-in-school-suspension-policy-keeps-students-out-of-class/.

[11] *See id.*

[12] *See id.*

[13] *See Expulsion*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2018).

[14] *See* Langley v. Monroe Cty. Sch. Dist., No. 07-60326 (5th Cir. 2008).

[15] *See* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U.L.Q. 65, 108 (2003).

[16] *Id.* at 81.

[17] *See* DANIEL J. LOSEN & RUSSELL SKIBA, *Suspended Education: Urban Middle Schools in Crisis*, S. POVERTY LAW CTR., http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

Suspensions and expulsions jeopardize students' academic success, unfairly target certain groups of students, and exacerbate student misbehavior. This paper focuses on suspensions and expulsions because suspensions and expulsions implicate and harm a student's state constitutionally protected interest in receiving a public education and are depriving students of educational opportunities to trigger state substantive due process violations.

Suspension and expulsions are a result of zero-tolerance policies in schools.[18] A zero-tolerance policy mandates predetermined consequences or punishment for specific offenses.[19] The initial purpose of zero-tolerance policies was to tackle the issue of gun violence in schools.[20] Under the Federal Gun Free Schools Act ("GFSA"), schools were mandated to expel any student who brought a firearm to school for one year while allowing schools to modify expulsion on a case-by-case basis.[21] If schools did not comply with the Act, they would jeopardize their right to receive federal funding.[22] Originally, the language of GFSA allowed schools to apply zero-tolerance discipline for students who were often described as dangerous, out of control, and in need of strict discipline in order to be forced to behave correctly.[23] Overtime, zero-tolerance policies have been expanded to include non-weapon related, non-violent behaviors, and minor to trivial offenses. As a result, zero-tolerance policies were eventually extended to apply to small infractions like smoking, possessing "drugs", and possessing weapons.[24] The trivial nature of these policies is exemplified when schools punish small offenses such possessing Midol or Aspirin as a drug offense.[25] Likewise, carrying keychains or geometric compasses has been deemed possession of weapons.[26] In some cases, zero-tolerance policies deal with more minor offenses such as uniform violations.[27] In theory, zero-tolerance policies were meant to serve as an efficient deterrent and method to reduce classroom distractions.[28] In practice, these policies were often misapplied

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[18] Blumenson & Nilsen, *supra* note 15 at 65-66.

[19] *See id.* at 68.

[20] *See id.* at 65-66.

[21] *See* Federal Gun Safety Act, 20 U.S.C. § 7151(b)(1).

[22] Blumenson & Nilsen, *supra* note 15 at 69.

[23] *See* WILEY BLACKWELL, THE WILEY HANDBOOK ON VIOLENCE IN EDUCATION: FORMS, FACTORS, AND PREVENTIONS, (HARVEY SHAPIRO ED., 2018).

[24] Blumenson & Nilsen, *supra* note 15 at 70.

[25] *Id.* at 72.

[26] *Id.*

[27] *See* CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE STRUCTURING LEGAL REFORM, https://nyupress.org/books/9780814763681/.

[28] *See* Nina Passero, *The Impact of Zero Tolerance Policies on the Relation Between Educational Attainment and Crime*, APPLIED PSYCHOL. ONLINE PUBLICATION UNDERGRADUATE STUD., https://wp.nyu.edu/steinhardt-appsych_opus/the-impact-of-

to behaviors that posed little threat to school safety or classroom order.[29] As consequence, zero-tolerance policies typically ignore the dangerousness of the offense and do not take in consideration the students age, cognitive capacity, or intent.[30]

Zero-tolerance and harsh disciplinary policies have a particularly negative impact on minority students. For example, during the 2009-10 school year (the same year as Viktoria King's fight), nearly ten percent of North Carolina students were suspended from school.[31] In that year, at least 3,368 of those suspensions were long-term suspensions. [32] Long-term suspensions are eleven or more school days under North Carolina state law. [33] An average of long-term suspension lasted 62.6 school days.[34] In California, educators handed out 67,945 suspensions just to Black students in 2016-17.[35] The highest total suspensions occurred in large urban counties, including Los Angeles County, Sacramento County, San Bernardino County, Riverside County, and Contra Costa County.[36] These five counties alone account for sixty-one percent of Black male suspensions.[37] Minority students are subject to expulsion and more and longer suspensions, which deprive them of educational opportunity, decrease achievement scores, increase the likelihood of a student dropping out by fivefold, and entering the criminal justice system.[38] As result of zero-tolerance and harsh disciplinary policies, discipline has led to a

zero-tolerance-policies-on-the-relation-between-educational-attainment-and-crime/.

[29] *Id.*

[30] *See* Kim et al., *supra* note 27, at 80 (citing to *Zero Tolerance Policies: A Report*, A.B.A. JUV. JUST. COMMISSION, http://www.abanet.org/crimjust/juvjus/zerotolreport.html).

[31] Mary Kenyon Sullivan, *Long-Term Suspensions and the Right to an Education: An Alternative Approach*, 90 N.C. L. REV. 293 (2011)

[32] *Id.* at 293-294.

[33] *Id.*

[34] *Id.*

[35] *See* Kyle Stokes, *California Suspension and Expulsion Rates Drop Again but Racial Gaps Remain*, KPCC (Nov. 4, 2017), https://www.scpr.org/news/2017/11/04/77355/though-racial-gaps-persist-california-suspension-a/.

[36] John McDonald, *Get Out! New Study Details High Rate of Suspensions of Black Males from California Public Schools*, SUDIKOFF INST. PUB. F. (Feb. 20, 2018), https://sudikoff.gseis.ucla.edu/get-out-new-study-details-high-rate-of-suspensions-of-black-males-from-california-public-schools/.

[37] *Id.*

[38] *See* Zachary W. Best, *Derailing the Schoolhouse-to-jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1679–80 (2011).

disproportionate number of racial minorities receiving long-term suspensions compared to their Caucasian counterparts.[39]

Despite these staggering numbers, students do not "shed their constitutional rights . . . at the schoolhouse gate."[40] The Equal Protection Clause of the 14th Amendment requires that when a state establishes a public-school system, no child living in that state may be denied equal access to schooling and "forbids the state to deprive any person of life, liberty, or property, without due process of law." [41] As a result, state's constitution educational clauses reference some substantive concept of education.[42] Some states have gone further to protect a student's education by indicating in their constitution that the state must deliver "efficient," "thorough," or "sound basic" education.[43] In the context of the principles listed above, suspensions and expulsion raise constitutional concerns well beyond the basic procedural due process rules that courts have traditionally applied.

The overreach of school authority has grown so unacceptable that students have challenged zero-tolerance policies under substantive due process claims as violations of their right to an education.[44] Most students are unsuccessful because courts tend to defer to the school board's judgement.[45] However, intervention by state courts is plausible, and substantive due process under state constitutions offer some limits against disciplinary outcomes. Certain punishments are simply so irrational in relation to the underlying violation that substantive due process prohibits schools from subjecting a student to them, regardless of the amount of notice and opportunity to respond the school afforded a student.[46] There is a connection between school education quality and disciplinary practices.[47]

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[39] *See* Russell J. Skiba & Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1087-88 (2010) (noting that although socioeconomic status is a predictor of suspensions, minority students are still suspended at a higher rate after accounting for socioeconomic status).

[40] Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 506 (1969).

[41] Goss v. Lopez, 419 U.S. 565, 572 (1975) (holding that due process requires that schools afford students notice and an opportunity to respond prior to suspension).

[42] *Id.* at 574.

[43] *See generally* Conn. Coal. for Justice in Educ. Funding, Inc. v. Bell, 990 A.2d 206, 229-45 (Conn. 2010) (listing state constitutions with educational requirements).

[44] *See* Ratner v. Loudoun Cty. Pub. Sch., No. 00-2157 (4th Cir. 2001).

[45] *Id.* at 142.

[46] *See, e.g.*, Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) (overturning a school policy punishing students for unknowingly possessing a weapon as irrational regardless of the procedural safeguards provided).

[47] *See* DEREK W. BLACK ET AL., EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 916 (2016).

Data shows that schools struggle to consistently deliver equal and adequate education opportunities without also ensuring effective discipline policy.[48] In short, ineffective discipline policies may be a primary cause of the inadequate and unequal education that students in those schools receive.[49] This is highlighted by the fact that studies show there is a connection between a large portion of the racial achievement gap and minority students disproportionately attending schools with dysfunctional disciplinary environments.[50]

This article explores when certain disciplinary measures violate students' right to an education and aims to provide guidance on the proper way for school administrators to prevent school practices and policies used to discipline students that may violate a student's right to an education, thus creating a greater risk that students enter the juvenile justice system in the future. Part II examines a student's state constitutional right to an education. Specifically, this section focuses on state constitutions with particularly open-ended or broad language about the right to "education" and a "qualitative education." In doing so, this section provides Kentucky's, North Carolina's, and California's Constitutions as examples. Part III focuses on the state constitutional implications of procedures that schools follow when disciplining, suspending, and expelling students. In addition, it discusses possible constitutional claims under the theory of scienter, substantially inferior education, and denial of access to alternative education and how a student may be able to show their state constitutional right to an education has been violated. Part IV analyzes which students are affected the most by these policies, focusing specifically on racial disparities. Part V discusses how Courts, Legislatures, and School Board Officials should consider a variety of contributing factors and potential solutions, so they can reform school policies to better serve a student's state right to an education. This section suggests that courts must intervene to prevent zero-tolerance policies from depriving students of educational opportunities, the legislature must implement laws and policies that require public schools to use alternative interventions rather than zero-tolerance punishment, and approaches that school administrations need to know so they can reform school policies to better serve a student's state right to an education.

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[48] *Id.*

[49] *Id.* at 615.

[50] *See* IMPROVING LEARNING ENVIRONMENTS: SCHOOL DISCIPLINE AND STUDENT ACHIEVEMENT IN COMPARATIVE PERSPECTIVE, 298-302 (RICHARD ARUM & MELISSA VELEZ EDS., 2012).

I. FUNDAMENTAL RIGHT TO EDUCATION

In general, a government action that burdens the exercise of fundamental rights or liberty interests, or that involves suspect class-classifications is subject to strict scrutiny and will be upheld only if the action serves a compelling governmental interest and is narrowly tailored to achieve that interest.[51] Examples of fundamental rights under the U.S. Constitution include the right to marry, the right to have children, and the right to bodily integrity. [52] The right to attend public schools, however, is not considered a fundamental right.[53] Government actions that do not affect fundamental rights or liberty interests, such as actions interfering with public school attendance, will be upheld under a lesser standard of review.[54] Such actions will be found constitutionally valid if they are considered to be rationally related to a legitimate interest.[55]

Unlike the Federal Constitution, every State contains an education clause that is critically important for determining whether students have a fundamental right to education at the state level.[56] For example, seven States, Colorado, Georgia, Idaho, Illinois, Indiana, Massachusetts, and Rhode Island, have held that education is not a fundamental right under their respective constitutions.[57] On the other hand, sixteen states have recognized a fundamental right to education, specifically: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. [58]

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[51] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[52] *Id.* at 720.

[53] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32-38 (1973).

[54] *Id.*

[55] Vacco v. Quill, 521 U.S. 793, 799 (1997).

[56] *See* Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 788 (2008).

[57] *See* Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1194 (Ill. 1996); Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095-97 (Mass. 1995); City of Pawtucket v. Sundlun, 662 A.2d 40, 55 (R.I. 1995), Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018-19 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975).

[58] *See* Brigham v. State, 692 A.2d 384, 391-95 (Vt. 1997); Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d 340, 346 (W. Va. 1997); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358-59 (N.H. 1997); Leandro v. State, 488 S.E.2d 249, 255-56 (N.C. 1997); Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Bismarck Pub. Sch. Dist. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989); Clinton Mun. Separate Sch. Dist. v.

Some states that have recognized a fundamental right to education have gone further by recognizing a fundamental right to a basic, sound, qualitative, or efficient education. For example, Kentucky and North Carolina have raised expectations for what schools must deliver to students in terms of academic outcomes by defining what is an "efficient" or "basic" education. To illustrate, Kentucky's constitution has opened-ended or broad language about the right to education. [59]The Education Clause in Kentucky's constitution states, "the General Assembly shall, by appropriate legislation, provide for an *efficient* system of common schools throughout the State"(emphasis added).[60] Because of the language stated in the Education Clause of Kentucky's constitution, a court found that "a child [has a fundamental] right to an *adequate* education under Kentucky's Constitution."[61] The court also added a layer of protection for students by stating that a student's fundamental right to an adequate education must be "protect[ed] and advance[d]" by the General Assembly.[62] Lastly, the court defined *efficient* by stating that "an efficient system of education must have as its goal to provide each and every child with at least . . . seven . . . capacities."[63] The seven capacities are:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
> (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

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Byrd, 477 So. 2d 237, 240 (Miss. 1985); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975); Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

[59] KY. CONST. art. XII, §183.

[60] *Id.*

[61] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

[62] *Id.*

[63] *Id.*

> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[64]

The right to a free public education is explicitly guaranteed by the North Carolina Constitution.[65] North Carolina's Constitution states that "the people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[66] In *Leandro v. State*, the court concluded that North Carolina is required to provide children with an education that meets some minimum standard of quality.[67] The standard that the court set is that an education is constitutionally inadequate if that education is "devoid of substance" and "does not serve the purpose of preparing students to participate and compete in the society in which they live and work."[68] Under this language, students in North Carolina have a fundamental right to a "basic" education.

California, which tends to fall on the liberal side on hotly debated political issues, is surprisingly an example of a state with a constitution that affords fewer rights to students. The Education Clause in California's Constitution states, "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.[69] Such language reads and suggests that students in California would have a state constitutional right to a qualitative education like students from Kentucky and North Carolina do. In fact, recently in 2016, a group of advocates in favor of educational quality in California "contend[ed] the language and history of Sections 1 and 5 of Article IX [of California's Constitution], and seminal judicial decisions declaring public education to be a fundamental right lead to the inexorable conclusion that public school students have a judicially-enforceable [sic] constitutional right to an education of 'some quality.'"[70] The court held that a student's right to education of some quality was not enshrined, as a constitutional right, under state constitutional provisions governing education since constitutional provisions did not provide a qualitative education element. [71] The court

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[64] *Id.*
[65] Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997).
[66] *See* N.C. CONST. art. I, § 15.
[67] Leandro, 488 S.E.2d at 254.
[68] *Id.*
[69] *See* CAL. CONST. art. IX, § 1.
[70] Campaign for Quality Educ. v. State, 209Cal.Rptr.3d 888, 894 (Ct. App. 2016).
[71] *Id.* at 894-95.

reasoned that the text of Sections 1 and 5 of California's Constitution language speaks only of California's general duty to provide for a system of common schools and does not require the attainment of any standard of resulting educational quality.[72] The court further explained that the phrases "['a system of common schools,' 'free,' and 'kept up and supported in each district'] do not require or prescribe any standard of educational achievement that must be attained by the system of common schools."[73] As a result, the court did not find an "explicit textual basis from which a constitutional right to a public school education of a particular quality may be discerned."[74]

The difference between a fundamental right to an education and a fundamental right to a qualitative education matters in terms of the limitations imposed on schools' disciplinary actions.[75] The distinction matters because a fundamental right to a qualitative education affords special protection since the court uses a heightened scrutiny to make sure the means justify the schools' disciplinary actions.[76] Here, Kentucky and North Carolina are examples of the strong protection offered to student's education. In contrast, even though there is a fundamental right to education in California but not to an education of "some quality," California creates a strong presumption against protecting students' rights. California has given the legislature considerable discretion in determining what is a qualitative education. As a result, the legislature can limit the kind of education that children receive after they are suspended or expelled since students do not have a fundamental right to an alternative education. For courts hearing challenges to schools' disciplinary actions, determining how much deference to give schools to exclude students from classrooms depends on whether education is a fundamental right.[77]

II. CONSTITUTIONAL CLAIMS

In states where education is a fundamental right, suspensions and expulsions should trigger strict scrutiny.[78] Previously, courts routinely emphasized that overturning school discipline policies based on substantive due process occurs only "in the rare case when there [was] no rational

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[72] *Id.* at 897.

[73] *Id.* (quoting *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 521 (Ind. 2009)).

[74] *Id.*

[75] *See* Robyn K. Bitner, *Exiled from Education: Plyler v. Doe's Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 792–93 (2015).

[76] *See id.*

[77] *Id.* at 778–80.

[78] Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 6 (2016).

relationship between the punishment and the offense."[79] However, with courts recognizing education as a constitutional right of students or a constitutional duty of states under state law, schools cannot simply take away a student's constitutional right to education without meeting some form of heightened scrutiny.[80]

Understanding the modern substantive due process framework will provide greater insights to those who would like to bring a claim under state law. Generally, there are four questions that are asked. First, is the asserted right fundamental? Or in other words, has the state declared the right to education to be a fundamental right. If the answer is yes, then the court should apply strict scrutiny review. Conversely, if the answer is no, then the court will apply rational basis review. The second question one must ask, is the asserted right infringed? In the context of school discipline, the *Goss* Court established that if the severity of a punishment is considered de minimis then the punishment is not a deprivation.[81] However, *Goss* also held that a ten-day suspension from school cannot be considered de minimis.[82] The third question to ask is, does the government have a sufficient justification for the law? If the right is fundamental, the government's interest must be compelling. If the right is not fundamental, the government's interest must be legitimate. Generally, school safety and maintaining school order is a compelling and legitimate state interest. Finally, the last question to ask is, are the means (suspension or expulsion) sufficiently related to the ends (the state's interest). If the right is fundamental, the means must be necessary to achieve the ends. This is often called narrow tailoring. In other words, the state must show that it cannot achieve its ends through means less burdensome on the right. If the right is not fundamental, the means must be rationally related to the ends. This is often called rational basis review.

Given that students do have a fundamental right to an education under all state constitutions, students may have better success in bringing constitutional challenges to disciplinary actions than they would under the U.S. Constitution. Generally, a student that has been suspended or expelled can argue that some of the discipline policies and practices deny students the right of access to education and hinder students from receiving their constitutionally required qualitative education. Also, students can argue that because state constitutions include a qualitative education component

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[79] Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000) (internal quotation marks omitted) (*quoting Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989); *see also* Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985).

[80] Black, *supra* note 78, at 6.

[81] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[82] *Id.*

the state has a duty to supply students with an education that allows them to meet particular substantive standards, graduate, and even pursue higher education or employment even when students are suspended or expelled.

When students are long-term suspended or expelled from school, two distinct deprivations of their rights may occur. The first, even when a student admits to violating a school policy, a punishment that "shocks the conscience" would violate a student's right to an education since the punishment is too "harsh".[83] Second, although some states require school districts to provide alternative education services to students excluded from school, many of these programs violate a student's right to a basic education by providing a substantially inferior education.[84] Within the second deprivation, disciplined students may use their right to equal access to hedge some protection when they are denied access to alternative education.

A. SCIENTER

First, suspension or expulsion of a student from a public school for a zero-tolerance weapons offense where scienter is not shown is a substantive due process limitation that state courts have imposed on when punishment may violate a student's right. Scienter is defined as a "mental state in which one has knowledge that one's action, statement, etc., is wrong, deceptive, or illegal."[85] The scienter requirement goes towards the student's state of mind regarding the particular infraction.[86] A lack of scienter could suggest that the state's means (suspension or expulsion) is not sufficiently related to the ends (school safety goals). In other words, expelling a student who may not have knowingly done anything wrong, does not serve a school's safety goals. The irrationality of disregarding intent by a school official is sufficiently egregious.[87] The most important case holding that zero-tolerance policies, which lack a scienter requirement, violate a student's substantive due process rights is *Seal v. Morgan*.[88]

In this case, Dustin Seal and Ray Pritchert were students at Powell High School, in Knox County, Tennessee.[89] Pritchert, a friend of Seal's, disputed

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[83] *See* Brown v. Plainfield Cmty. Consol. Dist. 202, 500 F. Supp. 2d 996, 1002 (N.D. Ill. 2007).

[84] *See* Bitner, *supra* note 75, at 783–84.

[85] *See Scienter*, DICTIONARY.COM, https://www.dictionary.com/browse/scienter?s=t.

[86] *See* Seal v. Morgan, 229 F.3d 567, 576 (6th Cir. 2000).

[87] *See Id.* at 578.

[88] *Id.*; *see also* Christopher D. Pelliccioni, *Is Intent Required - Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students*, 53 CASE W. RES. L. REV. 977, 983 (2003).

[89] *Morgan*, 229 F.2d at 570–71.

with another student that was dating his ex-girlfriend.[90] As a result of this dispute, Pritchert began carrying a hunting knife around.[91] Eventually, the knife was placed into the glove box of Seal's mother's car.[92] Seal knew that Pritchert had been carrying a knife around, and had the knife on his person when he was in the car, but it was unclear whether Seal actually saw the knife at any other point when the knife was in the car or even knew that the knife stayed in the car.[93] Seal was caught with the knife at a football game at school after the vice-principal searched Seal's car for a flask since the vice-principal had suspected that Seal and his friend were drinking alcohol.[94] Several days later, a disciplinary hearing was held and Seal was expelled pursuant to the district's zero-tolerance policy for possession of a knife on school grounds.[95] The board did not indicate that it thought that Seal was lying.[96]

The court stated that it "cannot accept the school Board's argument that because safety is important, and because it is often difficult to determine a student's state of mind, that it need not make any attempt to ascertain whether a student accused of carrying a weapon knew that he was in possession of the weapon before expelling him."[97] In other words, to accept the board's argument would be to allow it to effectively insulate itself even from rational basis review. The court found that "a reasonable trier of fact could conclude that Seal was expelled for a reason that would have to be considered irrational."[98] Here, the court reasoned that a student cannot injure another with a weapon or disrupt the operation of the school if that student is absolutely unaware of having possession of a weapon.[99] In short, punishing a student who does not intend to break the rules would be irrational.

The court came to its conclusion by relying on two hypotheticals. The hypotheticals involved innocent students who could be suspended for violating the board's zero-tolerance policy. The first hypothetical involved the school valedictorian who has a knife planted in his backpack without his knowledge by another student and is subject to expulsion for possessing a weapon on school grounds.[100] The second hypothetical involved a student

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 572–73.
[96] *Id.* at 578.
[97] *Id.* at 580.
[98] *Id.* at 579.
[99] *Id.* at 575–76.
[100] *Id.* at 576.

who unknowingly drinks the spiked punch at a high school dance and is subject to suspension or expulsion for violating a school policy against drinking at school functions.[101] The majority concluded that this student would be subject to expulsion or suspension for unknowingly drinking the punch, even if the school board was convinced that the student was completely unaware of the presence of alcohol in his drink.[102] Thus, the court believed that suspending innocent students who were unaware that they were carrying knives or drinking alcohol at a school dance would not be rationally related to a legitimate interest in protecting students.[103]

B. SUBSTANTIALLY INFERIOR EDUCATION

Another way that students may challenge school discipline policies as a due process violation is through a substantially inferior education theory.[104] Over the years, alternative education schools have morphed from a way to reach troubled students and ensure their academic success to a "dumping ground" for children with behavioral issues.[105] More often than not, education delivered at alternative schools is generally different from and qualitatively inferior to regular school.[106] The assignment to an alternative school where the education received at that alternative school is significantly different from or inferior to that received at the original public school could be considered a deprivation that is not *de minimis*, and therefore, deprive a student of their education interest. [107]

There are several factors that contribute to the low scores. One factor is that very "[f]ew state supreme courts have addressed the nexus between the existence of a fundamental right to education under the state constitution and the level of adequate education to protect that right" in alternative education schools.[108] This is likely because most courts tend to rule "that a student's interest in a public education can be forfeited by violating school rules."[109] However, additional factors such as unaligned curriculum, less qualified teachers, and the lack of accountability under No Child Left Behind ("NCLB") show that alternative education programs are different

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[101] *Id.* at 578.

[102] *Id.*

[103] *Id.*

[104] *See* Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352, 1359 (6th Cir. 1996).

[105] I. India Geronimo, *Deconstructing the Marginalization of "Underclass" Students: Disciplinary Alternative Education*, 42 U. TOL. L. REV. 429, 435 (2011).

[106] *Id.*

[107] *See* Laney v. Farley, 501 F.3d 577, 582–83. (6th Cir. 2007).

[108] *See* Bitner, *supra* note 75, at 790.

[109] Doe v. Superintendent of Sch., 653 N.E. 2d 1088, 1096 (Mass. 1995); *see also In re RM.*, 102 P.3d 868, 874 (Wyo. 2004).

than general public schools.[110] The combination of all these factors might account for the lower quality education at alternative schools.

Accordingly, a student may show that education delivered at alternative school is significantly inferior by identifying the different deficiencies the alternative school may be suffering from, such as the low quality of the curricula and teachers, the shorter length of the instructional day, and the lack of state accountability.[111] For example, many alternative education programs "effectively ban their students from receiving instruction in a curriculum aligned with state standards."[112] As a result, students' coursework in an alternative education program prevents students from advancing grades when they return to public school.[113] In addition, students still face the problem of interacting with teachers who are often less qualified than teachers in mainstream schools.[114] Moreover, the instructional day at an alternative education school is often shorter and therefore alternative school's classroom time is too short to provide a basic education.[115] Lastly, alternative education programs "are generally exempt from the requirement to make Adequate Yearly Progress ("AYP") on the state's measurable academic objectives" under NCLB. [116] AYP is a measurement that allows the U.S. Department of Education to determine how every public school and school district in the country is performing academically according to results on standardized tests.[117] However, alternative schools "rarely have enough students enrolled to yield statistically reliable information."[118] As a result, most alternative schools

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[110] *See* Bitner, *supra* note 75, at 788; No Child Left Behind Act, 20 U.S.C. § 6301 (2002) (noting that NCLB is a federal law that provides money for extra educational assistance for poor children in return for improvements in their academic progress).

[111] *See* Bitner, *supra* note 75, at 791; *see also* Kim et al. *supra* note 16, at 98 (citing Alternative Schools Report 1 at 8) (discussing the diversity of definitions across states and between scholars).

[112] *See* Emily Barbour, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 222 (2009).

[113] *See* Bitner, *supra* note 75, at 786.

[114] Geronimo*, supra* note 105, at 454.

[115] *See* Formal Complaint from David Lapp et al., Educ. Law Ctr., to Anurima Bhargava, Chief, Educ. Opportunities Section, U.S. Dep't of Justice (Aug. 7, 2013), https://archive.org/details/750289-elc-doj-aedycomplaint-8-7-13-1) (noting that a week at a mainstream school in Pennsylvania involves, on average, at least 27.5 hours of instruction as opposed to alternative schools in Pennsylvania which can offer as few as 20 hours of instruction per week).

[116] Barbour, *supra* note 112, at 203 n.67.

[117] *See* Title I of the Elementary and Secondary Education Act of 1965 (Improving the Academic Achievement of The Disadvantaged), 20 U.S.C. § 6301 (2000).

[118] Barbour*, supra* note 112, at 203 n.67.

"neither participate in state-mandated tests nor track students' post-school academic or professional outcomes."[119]

An alternative school in Springfield, Massachusetts is an example of students receiving a substantially inferior education.[120] In 2004, Massachusetts reported at an alternative school, one hundred percent of the third graders were not proficient in reading, one hundred percent of the sixth graders were not proficient in math, and one hundred percent of the tenth graders were not proficient in English.[121] Similar scores were reported across the state in other alternative schools in 2003, 2004, and 2005.[122] Since the release of these scores, Massachusetts has changed its policy and no longer requires alternative schools to track and report student performance.[123]

C. DENYING ACCESS TO AN ALTERNATIVE EDUCATION

Combining the right to a basic education with the claim of equal access, could offer stronger protections to disciplined students when they are denied access to alternative education.[124] Most states that have declared education as a fundamental right, offer alternative education as a statutory right and a suspended student only has a constitutional right to know the reason for their exclusion to alternative education.[125] However, exclusion from an alternative education potentially infringes on a student's state constitutional right to equal education access. In order to be potentially successful, a plaintiff will have to meet two requirements. First, the claim should be brought in a jurisdiction in which the state constitution provides a qualitative right to a certain kind of education. This is because past case law and state law do not "[suggest] that the fundamental right to the opportunity for a sound basic education is limited to any particular context."[126] In

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[119] *Id.* at 203–204.

[120] *Id.* at 224.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 9 (1973) (assuring a basic education for every child in the state); *see also Plyler v. Doe*, 457 U.S. 202, 239–41 (1982) (entitling students to the protection of the Equal Protection Clause of the Fourteenth Amendment).

[125] King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 261 (N.C. 2010).

[126] *See id.* at 267 (Timmons-Goodson, P., concurring in part and dissenting in part) (rejecting the majority's application of intermediate scrutiny to a constitutionally-rooted fundamental right to the opportunity for a sound basic education and contending that a purported violation of this right, including the cessation of all state-funded educational services, should be strictly scrutinized).

addition, a student has a right to be protected from a "complete termination of state-funded educational services."[127] Therefore, an alternative school would fall under the definition of "public education" if it is state funded. Second, a potential plaintiff would then show that a complete deprivation of all educational services is unnecessary and therefore not narrowly tailored. One way that students may do this is by showing that "it is possible to provide a student who has violated a school rule with some form of education without jeopardizing the safety of others."[128] Or "if a safe and orderly school environment can be maintained without barring a student from every single state-funded educational service, then such a barrier should not be erected."[129]

Claremont School District v. Governor provides guidance on when there could be a nexus between the existence of a fundamental right to education under the state constitution and the level of adequate education to protect that right in alternative education schools.[130] The court found that under New Hampshire's Constitution, "the State's constitutional duty extends beyond mere reading, writing, and arithmetic" and that mere competence in these basics is insufficient for a sound education.[131] Although the court in this case invalidated the legislature's school funding scheme, its approach can be applied in the discipline context.[132] The court found that strict scrutiny applied because a state-funded constitutionally adequate public elementary and secondary education is a fundamental right.[133] This case is instructive because the court's use of strict scrutiny "ensured that students have access to an adequate education."[134]

Here, in the context of school funding, the court suggested "that it will protect low-income students from receiving a subpar education due to a lack of resources."[135] But if the court's same logic were to apply in the context of school discipline, students with behavioral issues that are placed in alternative education schools may be protected from receiving a lower quality education since alternative education schools fail to provide students with even the "mere competence" in an education.[136] Assuming that the school's defense of students forfeiting their rights to education by misbehaving is absent, "the New Hampshire Supreme Court's reasoning

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[127] *Id.*
[128] *Id.* at 268.
[129] *Id.*
[130] Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997).
[131] *Id.* (quoting Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1997)).
[132] *See* Bitner, *supra* note 75, at 778.
[133] *Id.* at 791.
[134] *Id.*
[135] *Id.*
[136] *Id.*

could be utilized to protect students' education rights once they are long-term suspended or expelled" and assigned to an alternative school.[137]

Overall, students face a long list of obstacles in order to prevail on their claims. One is that given the deference courts grant schools, most discipline substantive due process claims will be in favor for schools when education is not a fundamental right. Another is that schools successfully argue that students forfeit their rights once they commit a school violation even when education is a fundamental right. However, this is not an excuse for courts to abandon the heightened scrutiny analysis altogether when education is a fundamental right. It appears as the theories discussed above serve as a vehicle for students to bring their claims into court. But in order to reform school discipline policies and protect students' constitutional right to education, litigation must focus on everyday discipline, not weapon and drug cases.[138] This is because drugs and weapons account for a very small portion of school expulsions, and school safety is a compelling and legitimate interest.[139] Constitutional claims should focus on everyday discipline because schools themselves report that minor misbehaviors, like disruption and disrespect, account for ninety-five percent of suspensions.[140] Any child may engage in simple behavior that may be considered disruptive, and that child should not lose their state constitutional rights to education simply for juvenile behavior, especially if courts have been willing to offer protection to students in the context of bullying by saying "kids will be kids." For example, U.S. District Judge J.P. Stadtmueller stated that:

> [N]o court decision will ever be able to end bullying. There will always be spats between children. Certain children will always say and do nasty things to one another. Try as they might, school officials will not be able to stop this, either, even if courts such as this one were to begin holding schools liable when their students engaged in reprehensible behavior. No matter how many judgments courts may hand out, the often cruel nature of children will still prevail over newly propagated rules and instructions.[141]

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[137] *Id.*

[138] *See* Black, *supra* note 78, at 26–27.

[139] *Id.*

[140] *See* M. Karega Rausch & Russell Skiba, *Unplanned Outcomes: Suspensions and Expulsions in Indiana*, Ctr. for Evaluation & Educ. Policy, 2 EDUC. POL'Y BRIEFS 1, 2 (2004), http://files.eric.ed.gov/fulltext/ED488917.pdf [https://perma.cc/Q4FA-BRUG].

[141] *See* N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., *Inc*. 965 F. Supp. 2d 1025, 1027 (E.D. Wis. 2013).

If these claims are not brought then these children will repeatedly be denied both the right to attend regular school and an alternative.

III. WHO IS AT RISK? RACIAL DISPARITIES AND EDUCATION QUALITY

Racial discrimination in school discipline is a real problem. Zero-tolerance and harsh disciplinary policies have a particularly negative impact on minority students. Despite laws that prohibit discrimination against racial minorities, these patterns have existed for many years. An overabundance of evidence shows that black students and other students of color are disproportionately punished more than white students.[142] For example, one study found that in Wisconsin, "[b]lack students were over seven times more likely to be suspended than their [w]hite peers." [143] Racial and ethnic disciplinary disparities have been found in several other states as well. In Minnesota, Nebraska, Iowa, and Pennsylvania black students were between four-and-a-half and six times as likely to be suspended as white students.[144] Zero-tolerance and harsh disciplinary policies have a particularly negative impact on Latino students as well. Although disparities for Latino students were not as high as black students, racial disparities for Latino students did exist in forty states. [145]

Research also shows that black students receive harsher punishments than white students who commit the same misconduct. To illustrate, black students more often receive long-term suspensions for conduct that is arguably not dangerous or serious enough to warrant long-term exclusion from an education.[146] Students may be suspended or expelled for subjective conduct such as truancy, cheating, running in the hall, dress code violations, foul language, and disrespect.[147] White students are more often disciplined

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[142] *See* Russell J. Skiba, Mariella I. Arredondo & Natasha T. William, *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE IN EDUC. 546, 546–564 (2014).

[143] *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 21 (2010), https://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf.

[144] *Id.*

[145] *Id.*

[146] *See* Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1088-89 (2010) (citing Anne C. McFadden & George E. Marsh, *A Study of Race and Gender Bias in the Punishment of School Children*, 15 EDUC. & TREATMENT CHILD. 140, 140-47 (1992)).

[147] *See* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 835–36 (2015).

for more objective conduct such as smoking and vandalism.[148] Supporters of zero-tolerance disciplinary policies may argue that increased student misbehavior is the cause of increased suspension and expulsion rates.[149] However, data reveals that students are slightly better behaved today than they were in prior eras.[150] All zero-tolerance and harsh disciplinary policies have done for these students is to essentially exclude racial minorities or at-risk students from a basic education for racial bias interpretations.

Harsh discipline policies also negatively affect other students and a school's overall academic quality. Among otherwise similarly situated schools, those with more punitive and rigid discipline approaches have the worst educational environments and lowered academic achievement.[151] Studies show that standardize test scores closely track suspension rates. For instance, "a school's emphasis on discipline and the number of suspensions a student received negatively predicted achievement in mathematics, science, and history even when controlling for a number of other variables including socio-economic status."[152] Thus, schools with the most suspensions also have the lowest test scores. In addition, data shows that school's response to student misbehavior affects the learning environment. [153] For example, two studies suggest that suspending students on a regular basis affects the general student body's perception of school authority and the school's climate.[154] Harsh disciplines also affect well-behaved students when well-behaved students begin to perceive school authorities as arbitrary and unfair.[155] Students who perceived school discipline as unfair "have a 35 percent likelihood of expressing a willingness to disobey rules"

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[148] *See id.* at 840.

[149] *See id.* at 835 (citing Blumenson & Nilsen, *supra* note 15, at 71; Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 364–365 (2011)).

[150] *Id.*

[151] *See* M. KAREGA RAUSCH & RUSSELL J. SKIBA, THE ACADEMIC COST OF DISCIPLINE: THE RELATIONSHIP BETWEEN SUSPENSION/EXPULSION AND SCHOOL ACHIEVEMENT, 24–25, (Center for Evaluation and Education Policy, 2005), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Academic-Cost-of-School-Discipline.pdf; *see also* Linda M. Raffaele Mendez & Howard M. Knoff & John Ferron, *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCHOL. IN THE SCH'S. 259, 270–71 (2002).

[152] *See* Rausch & Skiba *supra* note 140, at 18-19.

[153] *See* Black, *supra* note 78, at 74 (emphasizing schools' ability to implement alternative discipline regimes that alter and improve school climate).

[154] *See RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY, 34 (2003)*; *see also* Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URBAN EDUC. 536, at 538-39, 548 (2007) (finding that suspension and expulsion are related to school policies and factors not characteristics internal to students).

[155] Arum, *supra* note 154.

compared to five percent when discipline was perceived as fair.[156] Non-suspended students suffer from high levels of exclusionary practices. Non-suspended students' academic achievement is negatively affected. Scholars Perry and Morris found that the academic achievement of students who are not suspended goes down when suspension rates are high.[157]

The disparate impact that these policies have on certain student groups should not be tolerated. For students that are suspended or expelled, the substantiality of the harm is obvious, but the systemic problem is not necessarily so, unless we focus on data noted above.[158] Of course, factors such as the ones listed above have reciprocal effects to one another, but they would not undermine a plaintiff's claim. [159] In fact, they could strengthen them. [160] Evidence shows that there is a strong connection between student achievement and orderly and positive disciplinary environments are part of a quality education. [161] Here, the state is responsible for both the quality of education it delivers and discipline policy outcomes. Moreover, courts have supported this very premise: states may not shift any of their constitutional duties to local communities.[162] Without reform, minority students and at-risk students are particularly vulnerable to these disparities and at risk of falling victim to the School-to-Prison Pipeline' system.[163]

IV. POLICIES TO BETTER SERVE A STUDENT'S STATE RIGHT TO AN EDUCATION

As noted through extensive research in this article and by other scholars, zero-tolerance and harsh disciplinary policies accomplish little and fail to improve either safety or academic achievement on a school wide level. In fact, research shows that when students return, or if they don't return, to their mainstream schools from suspension or expulsion they tend to earn bad grades, drop out of school, and become involved with the criminal justice system. This systemic problem allows for students' state

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[156] *See id.* at 156, 182.

[157] *See* Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1068 (2014).

[158] *See* Black*, supra* note 78, at 61.

[159] *See id.*

[160] *See id.*

[161] *Id*.

[162] *See Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 216 (Ky. 1989*).

[163]See *School-to-Prison Pipeline*. American Civil Liberties Union, www.aclu.org/issues/juvenile-justice/school-prison-pipeline ("school-to-prison pipeline," is a disturbing national trend wherein children with a history of disabilities, poverty, abuse, or neglect are funneled out of public schools and into the juvenile and criminal justice systems where they are left isolated).

constitutional right to an education to be violated and allows for states to excuse their duty to provide an adequate education for *all* students. There is a discipline crisis and legal solutions are lacking. It is time for change. This section suggests potential remedies to the problematic aspects of long-term suspensions and lack of educational quality in alternative learning programs. Judges, legislatures, and school board officials should consider the following solutions.

A. JUDICIAL INTERVENTION

First, courts need to intervene. The need for courts to intervene to protect students' constitutional rights is greater than ever since current school practices show that zero-tolerance and harsh discipline policies will remain prevalent. This article does not suggest for a creation of a new theory of substantive due process to limit outrageous discipline policies on students. Nor does it suggest a complete overhaul of substantive due process. Strict scrutiny places too great of a burden on schools and rational basis review provides students too little protection, therefore a court can utilize intermediate scrutiny when deciding discipline due process cases. "In the school disciplinary context, intermediate scrutiny strikes a practical balance between protecting student access to educational opportunities and empowering school officials to maintain safe and orderly schools."[164]

Courts can intervene by engaging in a reasoned and logical analysis of school's disciplinary goals, including the legitimacy of the goals, and the extent to which suspension and expulsion further those goals. Truly focusing on the analysis will show that some school's policies and their punishments are so irrational that they cannot be defended. Intermediate scrutiny would allow courts to scrutinize the actual purpose behind the legislation and demand that the legislation actually be reasonably related to its valid purpose. In other words, a strengthened intermediate scrutiny test would ensure that students who were removed from educational opportunities were excluded because they were *truly* a danger, or *unreasonably* disruptive. One way that judges can engage in meaningful analysis is to no longer categorize and punish significantly different individuals as though they are the same.[165] For example, judges should not ignore the most basic of distinctions among offenses and judges should ask how dangerous was it? A student with an aspirin in his pocket for a headache is not a drug dealer.[166] A child yelling "stop or I'll shoot" while

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[164] *See* King ex rel. Harvey-Barrow v. Beaufort County Bd. of Educ., 364 N.C. 368 (2010).

[165] *See* Black*, supra* note 147, at 829.

[166] *Id.*

playing cops and robbers is not a threat to the school. Judges should not shy away from ruling that there is no rational basis to expel students when a minor incident such as an aspirin on their person and that when done the student has been denied his/her fundamental right to the opportunity for an education. Courts can also preclude the state from severely punishment students who engage in innocent behavior and/or make good-faith mistakes. The best example of this was presented in section 3.[167] With courts intervening, judges can move from its toothless form to one that can protect students' rights.

Courts must set precedent where a student has the right to a qualitative education. Due to the fact that a basic education must be provided, it remains unclear how that education must look. Here, state courts could turn to curriculum standards approved by state legislatures to try to define the term "basic" or qualitative. For example, a state must set a cut-off score at which students are considered proficient in tested areas. This is necessary beyond regular schools because effective alternative schools should exist to transition students back into regular school or have the students at alternative schools graduate with at least the same education as their peers in a public school.

B. LEGISLATION REFORM

Legislatures can provide a remedy to further protect students' state constitutional right to an education. Washington is a helpful example of how states could use the legislative office to provide greater protections to student's fundamental right to an education. For example, in Washington, "[a]s a general rule, no student shall be suspended for a long term unless *another form of corrective action* or punishment reasonably calculated to modify his or her conduct has previously been imposed upon the student as a consequence of misconduct of the same nature."[168] Such a rule is necessary because the first action taken against a student who violates a rule should not be suspension or expulsion. This type of regulation is necessary because the effect of regulation is that a long-term suspension for a first offense is impermissible. In addition, this approach would limit the ability of school officials to suspend students for minor infractions and encourage

[167] *Morgan*, supra note 89, at 16 (The hypotheticals involved innocent students who could be suspended for violating the board's zero-tolerance policy. First, school valedictorian who has a knife planted in his backpack without his knowledge by another student and is subject to expulsion for possessing a weapon on school grounds. Second, a student who unknowingly drinks the spiked punch at a high school dance and is subject to suspension or expulsion for violating a school policy against drinking at school functions).

[168] *See* WASH. ADMIN. CODE § 392-400-260 (2006) (emphasis added).

administrators to work with students to use more effective disciplinary techniques, rather than immediate suspension.

Positive Behavior Support ("PBS") systems is an effective disciplinary technique that gives students guidance by school administrators, instead of punishment. Positive behavior support is a generic term that describes a set of strategies or procedures designed to improve behavioral success by employing non-punitive, proactive, systematic techniques.[169] Schools that implement PBS demonstrate more positive behavior and academic outcomes.[170] This would help schools reach a highly vulnerable segment of the student body - those who need remedial help, behavior modification, or counseling. For example, Bald Creek Elementary School in North Carolina, experienced dramatic results by implementing PBS.[171] In 2003, Bald Creek saw office referrals decrease by sixty percent and in-school suspensions fell by seventy-two percent.[172] The legislature should recognize that schools with more at-risk youth would greatly benefit from receiving better behavioral counseling techniques. In order to remedy the problematic aspects of long-term suspensions, legislatures, like in Washington State, should enact PBS approaches to laws involving school discipline, suspension, and alternative education since it would likely limit the discretion school administrators have and potentially eliminate the risk of suspensions for minor violations.

The legislature can also help by requiring that all long-term suspended students, have the opportunity to participate in an alternative learning program during their suspension. This should be the very last resort for the very same reasons stated above. Legislatures can follow Connecticut laws. In Connecticut, the legislature implemented a policy where all students under the age of sixteen who receive long-term suspensions must "be offered an alternative educational opportunity."[173] Students between sixteen and eighteen facing their first long-term suspension must also be offered the opportunity to receive an alternative education as long as they desire to

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[169] *See* Andrea Cohn, *Positive Behavioral Support: Information for Educators*, NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS (2001), https://www.naspcenter.org/factsheets/pbs_fs.html.

[170] Jenni Owen, Jane Wettach & Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, DUKE CENTER FOR CHILD AND FAMILY POLICY AND DUKE LAW SCHOOL, 14 (2015), https://ncjuveniledefender.files.wordpress.com/2015/02/instead-of-suspension-alternative-strategies-for-effective-school-discipline.pdf.

[171] *Id*.

[172] *Id*.

[173] CONN. GEN. STAT. ANN. § 10-233d(d) (West 2010) (amended 2011).

continue their education and comply with certain conditions provided by a local or regional board of education.[174]

C. SCHOOL OFFICIAL DISCIPLINE PRACTICES

The attitudes of teachers, principals and administrators play a vital role in influencing suspension and expulsion rates. When school officials do not view suspension as a default consequence, the rates of out-of-school suspension are lower and the use of preventive measures is more common. For example, Jose Huerta, the principal of Garfield High School in East Los Angeles, did not view suspension as a default consequence. As a result, Mr. Huerta told his team that there would be no more suspensions.[175] Mr. Huerta created teacher and staff buy-in at the beginning of the process by meeting with small groups, allowing them to vote on certain aspects of the new plan, and allotting new professional collaboration time.[176] Accordingly, suspensions plummeted from 510 in 2008-09 to just two in 2010-12.[177] If there is evidence that avoiding suspending students for behavior that could be better addressed by other means, there should be greater initiative to increase the presence of school officials who do not view suspension as a default consequence. Mr. Huerta's story provides a useful example of how an upfront investment of time and effort from the school team and staff could help address the discipline crisis.

Another way to help end the discipline crisis at the school policy level is to have school districts clarify its school discipline policy. States should also clearly define what conduct is sufficient to warrant a long-term suspension. Clarifying school discipline policies helps in two ways. First, a clear discipline policy notifies students of the standards of behavior expected of them and conduct that may subject them to discipline. Second, a clear disciple policy shows the range of disciplinary measures that may be used by school officials. For example, in accordance with federal law, a

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[174] *But see* CONN. GEN. STAT. ANN. § 10-233d § 10-233d(e) (if a student who is sixteen or older is suspended for certain enumerated conduct, the school board is not required to offer him the opportunity to participate in an alternative education program. The enumerated conduct includes "conduct which endangers persons," because it involved possession of a firearm or dangerous weapon at school or a school-sponsored function, or dealing drugs at school or a school-sponsored function).

[175] Brian Rooney, *No More Suspensions at School Famous for 'Stand and Deliver'*, KCET (2012), https://www.kcet.org/shows/socal-connected/no-more-suspensions-at-school-famous-for-stand-and-deliver-0.

[176] *Id.*

[177] *See* Robert Ross & Kenneth Zimmerman, *Real Discipline in School*, NEW YORK TIMES (Feb 16, 2014), http://www.nytimes.com/2014/02/17/opinion/real-discipline-in-school.html?emc=etal.

long-term suspension is required for possession of a weapon or destructive device at school or at a school-sponsored activity that takes place off-campus. Of course, this would be subject to the scienter exception above.[178] At the local level, the Los Angeles Unified School District ("LAUSD") school board serves as a helpful example of how a clear discipline policy can help reduce arbitrary discipline. LAUSD was concerned by the growing number of minorities who were receiving suspensions for "willful defiance." Of the 700,000 suspensions that were doled out in California during the 2011-12 school year, approximately half were for "willful defiance."[179] As a result, in 2013, LAUSD redefined what are acts of "willful defiance" and directed school officials to use alternative disciplinary practices if a students' conduct was considered a "willful defiance."[180] LAUSD defined the term "willful defiance" to encompass infractions such as talking back to teachers, using cell phones in class, public displays of affection or repeated tardiness.[181] Here, by not suspending students for minor infractions, LAUSD was able to keep students from falling behind their classmates, dropping out of school, or even ending up in jail. The result of these reforms has been a dramatic reduction in total suspensions.[182]

CONCLUSION

Extreme discipline for what was arguably innocent or relatively minor behavior must be stopped. Students in elementary, middle, and high school have state constitutional rights to an education that are continually violated and states continue to ignore their duty to provide a meaningful education due to the discretion that courts offer school boards. Schools should be able to discipline students, however, the current methods are not acceptable. Data has shown that zero-tolerance and harsh discipline policies are problematic to students who are punished, to the non-punished student, and

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[178] Morgan, supra note 167, at 28

[179] Edward Graham, *Is 'Willful Defiance' Still Grounds for Suspension*, EATODAY (Aug. 14, 2013, 8:55 AM), http://neatoday.org/2013/08/14/should-willful-defiance-be-grounds-for-suspension/.

[180] *See* Teresa Watanabe, *L.A. Unified bans suspension for 'willful defiance'*, LOS ANGELES TIMES (May 14, 2013, 12:00 AM), http://articles.latimes.com/2013/may/14/local/la-me-lausd-suspension-20130515.

[181] Ross & Zimmerman, *supra* note 175.

[182] *See* Faer, Laura, and Sarah Omojola. "*Fix School Discipline How We Can Fix School Discipline Toolkit for Educators*" PUBLIC COUNSEL (January 25, 2020, 10:18 PM), njpsa.org/documents/pdf/FixSchoolDiscipline.pdf.

("In 2012-2013, the school had 89 suspended students and 189 total suspensions. In 2013-2014, the first year of SWPBIS implementation, Azusa High issued 3 suspensions to 3 students. So far this year, it has issued just one").

to the quality of the learning environment. Courts have said that "an education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[183] Harsh discipline policies do not serve the purpose of preparing student to participate and compete in society since it usually leads to the criminalization of students, especially amongst minority and at-risk students. Long-term suspensions have a permanent effect on the future educational success of young students. Judges, legislatures, and school administrators all need to work together in order to implement a strong framework to protect the rights of students.

[183] Leandro v. State, 346 N.C. 336, 345 (1997).